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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS.

PETITION FOR CERTIORARI FILED AUGUST 5, 1941.

CERTIORARI GRANTED OCTOBER 13, 1941.

SUPREME COURT OF THE UNITED STATES

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ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

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[fol. 1]

IN COURT OF CLAIMS OF THE UNITED STATES

No. L-51

THE SEMINOLE NATION,

vs.

THE UNITED STATES

I. HISTORY OF PROCEEDINGS

The original petition was filed February 24, 1930.

On April 5, 1930, a general traverse was filed by the defendant to the original petition.

On September 19, 1934, on motion made therefor, and allowed by the court, the plaintiff filed its amended petition.

On June 4, 1935, the case was submitted to the court on merits without argument.

On December 2, 1935, the court filed findings of fact and conclusion of law, judgment for plaintiff in the sum of \$1,317,087.27, with opinion by Williams, J.

On January 18, 1936, the defendant filed a motion for an extension of time within which to file a motion for a new trial, which was allowed by the court on January 21, 1936.

On February 6, 1936, the defendant filed its motion for a new trial.

On March 2, 1936, the court filed an Order overruling defendant's motion for a new trial.

[fol. 2] On May 13, 1936, the defendant filed a motion for leave to file a second motion for a new trial, which was allowed by the court on May 18, 1936.

On May 18, 1936, the defendant's second motion for a new trial was filed, and was placed on the June Law Calendar by the court for argument.

On June 1, 1936, the defendant's second motion for a new trial was argued and submitted.

On June 8, 1936, the court filed an order overruling defendant's second motion for a new trial.

On June 23, 1936, the defendant filed a request for record in re certiorari.

On July 3, 1936, the record in re certiorari was delivered to the defendant.

On October 16, 1936, the Order of the U. S. Supreme Court granting certiorari was filed, in this office.

On February 10, 1937, the Mandate of the U. S. Supreme Court reversing the judgment of this court, and remanding the case for further proceedings was filed in this court.

On March 20, 1937, the plaintiff filed a motion for judgment pursuant to the Mandate of the U. S. Supreme Court.

On May 3, 1937, the court filed an Order entering judgment for plaintiff in the sum of \$10,099.25.

On May 7, 1937, the attested transcript of judgment was delivered to Paul M. Niebell, the attorney of record.

[fol. 3] On September 8, 1937, the plaintiff filed a motion to reinstate case under the Act of August 16, 1937, which motion was allowed by the court on September 30, 1937.

On October 25, 1937, the plaintiff filed a motion for leave to file a second amended petition, which was allowed on November 8, 1937, and second amended petition was filed.

On December 6, 1937, the plaintiff was paid \$10,099.25, by Treasury Warrant No. 576, to satisfy judgment of May 3, 1937.

II. SECOND AMENDED PETITION

(Original Petition Filed Feb. 24, 1930)

(Amended Petition Filed Sept. 19, 1934)

(Second Amended Petition Filed Nov. 8, 1937)

To the Honorable the Court of Claims:

The plaintiff, the Seminole Nation, respectfully represents:

I

That by a certain act of Congress, approved May 20th, 1924 (43 Stat. 133, as modified by Joint Resolution approved May 19, 1926; 44 Stat. 568, giving permission to file separate petitions, and Joint Resolution of February 19, 1929, 45 Stat. [fol. 4] 1229, extending the time for filing suits until June 30, 1930, and by a certain act of Congress, approved August 16, 1937, Public No. 296, 75th Congress, 1st Session, Chapter 651, permitting amended petitions to be filed prior to January 1, 1938, and reinstating this case), plaintiff was

authorized and empowered to bring and maintain this action.

II

That at all times mentioned herein, and for many years prior thereto, the Seminole Nation was the owner of large trust funds, which represented the consideration given by the United States for the cession of certain of its lands, which said trust funds were held in trust by the defendant for the use and benefit of plaintiff; and that there existed various treaties and agreements between said plaintiff and defendant; and certain acts of Congress, whereby said trust funds were to be managed and invested by defendant for the benefit of plaintiff, which said treaties, agreements, and statutes are hereinafter more specifically referred to.

III

That the Seminole Treaty of August 7th, 1856 (11 Stat. 699), provided in part as follows:

"Article 8. In consideration of such release, discharge, and obligation, . . . the United States do therefore agree and stipulate as follows, viz.: To pay to the Seminoles now in the west, . . . to provide annually for ten years [fol. 54] the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith-shops among them, said sums to be applied to these objects in such manner as the President shall direct."

"Article 9. The United States agree to . . . expend for them in improvements, after they shall all remove, the sum of twenty thousand dollars."

That under said Articles 8 and 9, the total obligation of the United States to the Seminole Nation was \$92,000.00. That notwithstanding said definite treaty obligation the defendant, in violation thereof, either illegally disbursed, or failed and neglected to disburse and thus retained, wholly or in part, the amounts annually appropriated by Congress for the purpose of fulfilling said treaty obligation; therefore, all of said \$92,000.00 was not disbursed for the benefit of plaintiff, in accordance with the terms of said treaty, and

defendant is now liable to plaintiff for the balance due thereunder in the amount of, to-wit, \$63,353.42.

IV

That Article 8 of said Treaty of August 7th, 1856, 11 Stat. 699, provided further in part as follows:

[fol. 6] " * * * the United States do therefore agree and stipulate as follows, viz: * * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws."

That notwithstanding the plain obligation of the United States to pay interest on said funds at the rate of five per centum per annum under the terms of said treaty, the defendant, in violation thereof, either illegally disbursed, or failed and neglected to disburse and thus retained, wholly or in part, the amounts annually appropriated by Congress for the purpose of fulfilling said treaty obligation; therefore, said interest was not disbursed in accordance with the [fol. 7] terms of said treaty, and defendant is now liable to plaintiff for the amount of said unpaid interest, amounting to \$154,551.28.

V

That Article 3 of the Seminole Treaty of March 21st, 1866, 14 Stat. 755, provided in part as follows:

" * * * The balance due the Seminole Nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United

States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools:

That although said treaty provision continued in full force and effect until the close of the fiscal year 1909 (see the Act of March 3, 1909, 35 Stat. 781, capitalizing said \$50,000.00 fund), yet the defendant, in violation thereof, either illegally disbursed, or failed and neglected to disburse and thus retained, wholly or in part, the amounts annually appropriated by Congress for the purpose of fulfilling said treaty obligation; therefore, said interest was not disbursed [fol. 8] in accordance with the terms of said treaty, and defendant is now liable to plaintiff for the balance due thereunder in the amount of, to-wit, \$90,597.20.

VI

That Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided as follows:

"Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (\$10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected), which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

That although said amount of \$10,000 was twice appropriated by Congress for the fulfillment of said Article 6, yet the defendant, in violation of said treaty provision, either illegally disbursed, or failed and neglected to disburse and thus retained, said \$10,000.00, and did not erect said agency buildings in accordance with the terms of said [fol. 9] treaty; therefore, the defendant is now liable to plaintiff for the said amount of \$10,000.00 under said treaty obligation.

VII

That by the Acts of Congress, approved April 15, 1874 (18 Stat. 29), and March 2, 1889 (25 Stat. 980, 1004), certain Seminole tribal income, due from the United States to the Seminole Nation, was authorized to be paid into the Seminole tribal treasury, and the disbursement thereof was entrusted to the Seminole tribal officials.

That since the passage of said Act of April 15, 1874, it was reported by the officers of defendant that the Seminole tribal officials were misappropriating the Seminole tribal funds entrusted to them, and robbing the members of the tribe of an equal share of the tribal income (Exh. 306-348, 555-576, 670-680). That the reports of the Dawes Commission show conclusively that the governments of the Five Civilized Tribes were notoriously and incurably corrupt, that every branch of the service was infested with favoritism, graft and crookedness, and that by such methods the tribal officers acquired large fortunes, while the other members entitled to share in the tribal income received little benefit therefrom.

That in order to correct such conditions existing within the governments of the Five Civilized Tribes, and to insure the proper disbursement of the tribal income, Congress [fol. 10] passed what is known as the Curtis Act, approved June 28, 1898, 30 Stat. 495, under the terms of which defendant was directed to impound all of the funds of plaintiff, and assume full administrative control over the disbursement of same.

That Section 19 of said Act of June 28, 1898, provided as follows:

"Sec. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

That said Section 19 remained in full force and effect as to the Seminole Nation during the fiscal years from 1899 to 1907, both inclusive; that notwithstanding the plain inhibition in said section that no payments thereafter should be made to "the tribal governments or to any officer thereof for disbursement," and over the protest of a large number of Seminoles, yet in disregard thereof and in violation of said Section 19 the defendant, during said period, illegally [fol. 11] paid over to the Seminole tribal treasurer large amounts of Seminole tribal income, in the sums of, and derived from the following sources:

Treaty of August 7, 1856 Funds	\$212,500.00
Treaty of March 21, 1866 Funds	29,750.00
Act of March 2, 1889 Funds	622,156.87
Indian Moneys, Proceeds of Labor Fund	295.71
Total	864,702.58

Therefore, the defendant is liable to plaintiff in the amount of \$864,702.58 thus illegally disbursed in violation of said Section 19 of said Act of June 28, 1898.

Wherefore, plaintiff prays that judgment be entered against defendant for the total amounts due plaintiff under said unfulfilled treaty obligations of defendant, and for the total amounts of Seminole tribal funds illegally disbursed by defendant in violation of said Section 19 of the Curtis Act, together with interest on same at five per cent per annum; and that plaintiff may have such other and further relief as to the court may seem just and proper.

The Seminole Nation, By Paul M. Niebell, Its Attorney of Record.

Of Counsel: W. W. Pryor, (E. J. Van Court, Deceased), District of Columbia.

[fol. 12] Personally appeared before me, a notary public in and for said District of Columbia, Paul M. Niebell, who being by me first duly sworn, deposes and says: That he is one of the attorneys for plaintiff; that his authority to so represent plaintiff is filed with case No. L-51 in this court; that he is authorized under an act of Congress approved May 20, 1924 (43 Stat. 133), to make verification of the above and foregoing second amended petition; that he has read said petition, and knows the contents thereof; that the mat-

ters and things therein alleged are true to the best of his knowledge, information and belief.

Paul M. Niebell.

Subscribed and sworn to before me this 21st day of October, 1937. Lewis R. Watson, Notary Public, D. C. My Commission Expires Sept. 1, 1941. (Seal.)

[fols. 13-14] **III. GENERAL TRAVERSE TO SECOND AMENDED PETITION—Filed December 16, 1937**

And now comes the Attorney General, on behalf of the United States, and answering the second amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the second amended petition be dismissed.

Carl McFarland, Assistant Attorney General. G. T. S., R. T. N.

IV. ARGUMENT AND SUBMISSION OF CASE

On October 3, 1939, the case was argued and submitted on merits by Mr. Paul M. Niebell for plaintiff, and by Mr. Wilfred Hearn for defendant.

[fol. 15] **V. Special Findings of Fact, Conclusion of Law and Opinion of the Court by Whitaker, J.—Filed January 6, 1941**

Mr. Paul M. Niebell for the plaintiff. Mr. W. W. Pryor was on the brief.

Mr. Wilfred Hearn, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the brief.

This case having been heard by the Court of Claims, the Court, upon the evidence adduced, makes the following

SPECIAL FINDINGS OF FACT

1. By an act of Congress approved May 20, 1924 (43 Stat. 133), it is provided:

That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or stat-

utes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

Sec. 2. Any and all claims against the United States within the purview of this act shall be forever barred unless suit be instituted or petition filed as herein provided in the Court of Claims within five years from the date of approval of this act, and such suit shall make the Seminole Nation party plaintiff and the United States party defendant. The [fol. 16] petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with the Seminoles approved by the Commissioner of Indian Affairs and the Secretary of the Interior; and said contract shall be executed in their behalf by a committee chosen by them under the direction and approval of the Commissioner of Indian Affairs and the Secretary of the Interior. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Indian nation to such treaties, papers, correspondence, or records as may be needed by the attorney or attorneys of said Indian nation.

Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation, but any payment which may have been made by the United States upon any claim against the United States shall not operate as an estoppel, but may be pleaded as an offset in such suit.

Sec. 4. That from the decision of the Court of Claims in any suit prosecuted under the authority of this act, an appeal may be taken by either party as in other cases to the Supreme Court of the United States.

Sec. 5. That upon the final determination of any suit instituted under this act, the Court of Claims shall decree such amount or amounts as it may find reasonable to be paid the

attorney or attorneys so employed by said Indian nation for the services and expenses of said attorneys rendered or incurred prior or subsequent to the date of approval of this act: Provided, That in no case shall the aggregate amounts decreed by said Court of Claims for fees be in excess of the amount or amounts stipulated in the contract of employment, or in excess of a sum equal to 10 per centum of the amount of recovery against the United States.

Sec. 6. The Court of Claims shall have full authority by proper orders and process to bring in and make parties to such suit any or all persons deemed by it necessary or proper to the final determination of the matters in controversy.

Sec. 7. A copy of the petition shall, in such case, be served upon the Attorney General of the United States, and he, or some attorney from the Department of Justice to be designated by him, is hereby directed to appear and defend the interests of the United States in such case.

[fol. 17] This act was modified by joint resolution of May 19, 1926 (44 Stat. 568); permitting plaintiff to bring separate suits on one or more causes of action, and by the act of Congress approved February 19, 1929 (45 Stat. 1229) the time for filing such suits was extended to June 30, 1930.

Under the provisions of said act the original petition herein was filed on February 24, 1930, and an amended petition was filed on September 19, 1934.

2. Subsequent to the decision of the Supreme Court on January 14, 1931, in *United States v. Seminole Nation*, 299 U. S. 417, holding that there could be no recovery for items included for the first time in an amended petition filed after the expiration of the statute of limitations, Congress passed an act, approved August 16, 1937 (50 Stat. 650), which provided:

That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Acts . . . plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims,

notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits.

Under the terms of said act this case was reinstated on September 30, 1937. A second amended petition was filed on November 8, 1937.

3. Under the terms of article VIII of the treaty of August 7, 1856 (11 Stat. 699, 702), between the United States and [fol. 18] the Creek and Seminole Tribes of Indians, the United States agreed in respect of the Seminoles, among other things:

• • • to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, • • •

said sums to be applied to said objects in such manner as the President should direct.

For each fiscal year during the ten-year period from 1858 to 1867, inclusive, Congress annually appropriated as provided by article VIII of the said treaty the following amounts: \$3,000 for support of schools; \$2,000 for agricultural assistance; and \$2,200 for the support of smiths and smith shops, or a total of \$72,000, the amount due the Seminoles under these provisions of the treaty.

While the said amounts were duly appropriated by Congress and made available for the purposes named, only \$10,436.58 of the amounts so appropriated was disbursed

in payment of the above treaty obligations. The balance of \$61,563.42 was disbursed by the United States prior to June 30, 1866, for the purpose of clothing and feeding refugee and destitute Indians who had been driven from their homes during the Civil War on account of their friendship for the government.

4. Under the provisions of article IX of said treaty of August 7, 1856, the United States agreed to expend for the Seminoles then in Florida, after they had all removed to the Seminole country west, the sum of twenty thousand dollars in improvements. Accordingly, in March 1857 Congress appropriated \$20,000 to be expended for improvements for the Seminoles in Florida after they had removed to the Seminole country west. After a number of them had been so removed, there was disbursed from this appropriation for improvements the sum of \$18,210.00.

5. Under the provisions of said article VIII of the treaty of 1856 the United States further agreed in respect of the Seminoles:

* * * to invest for them the sum of two hundred fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; [fol. 19] the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity; * * *

After the passage of the act of July 26, 1866 (14 Stat. 263, 264), Congress annually appropriated for each fiscal year from 1867 to 1909, both inclusive, the sum of \$25,000 as provided for in the above article.

During each year through and including the year 1906 the United States disbursed the sums thus appropriated either by making direct per capita payments to members of the tribe or by cash payments to the treasurer of the Semi-

seminole Nation, except for the following years when the amount so disbursed was as follows:

Year	Payment	Deficit	Overpayment
1867	\$12,500.00	\$12,500.00	
1868	24,556.00	450.00	
1869	24,999.75	.25	
1870	19,679.00	5,321.00	
1871	12,500.00	12,500.00	
1872	12,374.55	12,625.45	
1873	12,401.00	12,599.00	
1874	13,898.42	11,101.58	
1875	25,082.25		82.25
1876	500.00	24,500.00	
1877	36,381.00		11,381.00
1879	24,546.00	454.00	
1880	25,454.00		454.00
1882	25,028.00		28.00
1883	25,182.29		182.29
1907	12,500.00	12,500.00	

The excess of the foregoing deficits over the overpayments is \$92,423.74.

In the following years the United States disbursed the following amounts of said appropriations for the benefit of the Seminole Nation, but for purposes other than that specified in said article. These payments were made pursuant to resolutions of the Seminole General Council:

Year	Amount
1870	\$17,821.00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

[fol. 20] In the years 1907 to 1909, both inclusive, the following amounts of said appropriations were paid to the United States Indian Agent:

Year	Amount
1907	\$12,500.00
1908	25,000.00
1909	25,000.00

6. By article.III of the treaty of March 21, 1866 (14 Stat. 755), it was, among other things, provided:

* * * seventy thousand dollars to remain in the United States treasury, upon which the United States shall pay an

annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; . . .

Appropriations were made for the payment of interest on the funds named in the above treaty provision for each fiscal year from 1867 to 1909, inclusive.

During the fiscal years 1867 to 1874, both inclusive, of the \$20,000 theretofore appropriated in payment of accrued interest on the \$50,000 permanent school fund, \$16,902.80 was disbursed by defendant for educational purposes. During the years 1875 to 1907, both inclusive, defendant paid into the Seminole national treasury the entire amount appropriated for interest on the \$50,000 school fund and on the \$20,000 for the support of the Seminole Government. During said period the Seminole Nation disbursed from its treasury not less than the sum of \$7,500 per annum for the maintenance of its schools.

7. Article VI of said treaty of March 21, 1866, provides:

Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (\$10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be directed [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

By act of July 28, 1866 (14 Stat. 319), Congress appropriated \$10,000 for the purpose of erecting agency buildings as provided for in said article. This money was not used and was thereafter returned to surplus. By act of May 18, 1872 (17 Stat. 132), another appropriation was made to

take the place of the amount so returned to surplus. \$9,030.15 of this amount was used for some purpose, but for what purpose the record does not reveal. However, an agency building was erected on the Seminole reservation in the year 1873.

In the years 1870 and 1872 the amount of \$931.76 was expended from general appropriations for agency buildings and repairs.

8. During the fiscal years 1899 to 1907, both inclusive, the defendant made payment to the tribal treasurer of various moneys due the Seminole Nation in the total sum of \$864,702.58. Of this total amount, \$212,500 was interest on the two trust funds of \$250,000 each set up under article VIII of the treaty of 1856; \$29,750 thereof was interest on the trust funds of \$50,000 and \$20,000 under article III of the treaty of 1866; \$622,156.87 thereof was interest on the fund of \$1,500,000 set up under the act of March 2, 1889 (25 Stat. 980, 1004); and \$295.71 was "Indian moneys, proceeds of labor."

These moneys were paid to the tribal treasurer at the request of the council of the plaintiff, but over the protest of some of the individual members of the tribe. They were all expended by the tribal officers, except the sum of \$1,128.88, which was paid to the defendant's representative after the disbursement of all funds had been taken away from the tribal officers by the act of April 26, 1906 (34 Stat. 137).

The books of the tribal treasurer showing the receipt and expenditure of these moneys are crude, and no proof was introduced as to their accuracy, but such as they are they tend to show that \$815,059.71 of these moneys were expended [fol. 22] by the tribal officials in the years 1899 to 1906, both inclusive, for the following purposes and in the following amounts:

Tribal officers	\$152,900.00
Emahaha Mission School	79,000.00
Mekusukey Mission School	79,000.00
Day Schools	16,000.00
School expense	8,000.00
Blacksmith	24,000.00
National physician	27,000.00
Per capita payments	341,516.67
Interest	10,533.33
Contingencies	12,000.00

Surplus	29,409.71
Attorney's fees	27,000.00
Church	4,200.00
Spring payments	4,500.00

9. Under article III of the Treaty of 1866 it was agreed that \$40,362 of the consideration due the Seminole Nation for the cession of lands to the United States should be used for subsisting the Seminole Indians. That amount was disbursed for that purpose during the fiscal year 1867. By act of July 27, 1868 (15 Stat. 199, 214) Congress appropriated \$31,083.79 for the following purpose:

To supply a deficiency in appropriation for subsisting Seminole Indians, thirty-one thousand and eighty-three dollars and seventy-nine cents; which amount shall be deducted from any money or funds belonging to said tribe of Indians.

The sum so appropriated was used by defendant during the fiscal year 1869 for the purchase of provisions for the Seminole Indians; but no deduction from plaintiff's funds has been made on that account as required by said act.

10. In undertaking to locate the Seminole Indians on the 200,000 acres provided for them by the treaty of 1866 prior to a survey, an error was made with respect to the location of the eastern boundary of the tract as described in the treaty, as a result of which the Seminoles were placed in possession of lands owned by the Creeks which were located east of and adjoining the tract of 200,000 acres. Upon these lands improvements were placed by the Seminoles before the error was discovered. By act of March 3, 1873 (17 Stat. [fol. 23] 626), the Secretary of the Interior was authorized to negotiate with the Creeks for the relinquishment to the United States of such parts of their country as may have been so occupied by the Seminoles. Thereafter the Creek Nation, for a consideration of \$175,000, ceded to the United States 175,000 acres of its lands located east of and adjoining the 200,000 acres set aside for the Seminoles under the treaty of 1866. In 1888 a survey was made for the purpose of establishing the eastern boundary of the tract of 175,000 acres, but by reason of error in the survey the area inclosed was 177,397.71 acres, for which the Creeks were paid \$177,397.71. This became a part of the Seminole reservation, in addition to the 200,000 acres, more or less, and was dis-

posed of either by allotment to members of the tribe or by sale for the account of the tribe.

11. During the period from the beginning of the fiscal year 1857 and ending with the fiscal year 1866, the United States expended for the benefit of the Seminole Nation the sum of \$42,861.54 for the following purposes:

Purpose	Gratuity Rept., G. A. O. pages	Amount
Agency buildings and repairs.....	27	\$5,209.00
Clothing.....	142, 143	610.00
Education.....	38, 39	2,500.00
Expenses of delegates.....	127, 141	5,155.70
Fuel, light, and water.....	52, 53	98.50
Miscellaneous agency expenses.....	52, 53, 142	1,239.50
Pay of Indian Agents.....	125, 163	15,475.05
Pay of Interpreters.....	52, 124	3,910.00
Pay of miscellaneous employees.....	52, 141	158.50
Presents.....	127	168.80
Provisions and other rations.....	141, 142, 163	4,657.57
Transportation, etc., of supplies.....	52, 53	3,687.92
Total.....		42,861.54

Of the foregoing items the amounts spent for the following were spent gratuitously: clothing, education, presents, provisions and other rations, fuel, light and water, miscellaneous agency expenses, pay of Indian agents, pay of interpreters, pay of miscellaneous employees, and transportation, etc., of supplies.

12. During the period beginning with the fiscal year 1867 and ending with the fiscal year 1898, the United States expended gratuitously for the benefit of the Seminole Nation the sum of \$27,720.90 for the following purposes:

[fol. 24]

Purpose	Gratuity Rept. G. A. O. pages	Amount
Education.....	37, 54, 55	\$171.89
Expenses of delegations.....	40, 143	4,309.00
Feed and care of livestock.....	53, 54, 55, 67	345.00
Fuel, light, and water.....	54, 56, 67	68.50
Medical attention.....	55, 177	425.68
Miscellaneous agency expenses.....	27, 40, 53-57	6,749.94
Pay of Indian Agents.....	40, 55, 125	10,410.77
Pay of interpreters.....	57, 124	3,384.50
Pay of miscellaneous employees.....	54-56	180.00
Provisions and other rations.....	67, 143	659.12
Transportation, etc., of supplies.....	40, 53, 54	1,016.50
Total.....		27,720.90

13. During the period beginning with the fiscal year 1899 and ending with the fiscal year 1934, the United States ex-

pended gratuitously for the benefit of the Seminole Nation the sum of \$32,309.21 for the following purposes:

Purposes	Gratuity Rept. G. A. O. pages	Amount
Appraising	43, 47, 48	\$3,474.93
Clothing	167-168	5.42
Enrolling	42, 45, 46, 48	432.96
Education	96, 97, 98, 104, 105, 107, 109, 144-151, 152-154, 173, 174.	20,377.89
Expenses of delegates	153	149.90
General office expenses	14, 16, 43, 45, 47	2,539.40
Livestock	167	35.00
Medical attention	51, 152	1,124.12
Miscellaneous agency expenses	64, 164, 165	109.69
Pay miscellaneous employees	167	10.00
Per capita payment expenses	14, 16, 78	507.96
Preservation of records	128	40.15
Probate expenses	129, 136	2.00
Protecting property interests	137, 138	17.50
Provisions and other rations	168	216.00
Sale of townsites	18, 20	1.65
Surveying	43, 45, 48	501.95
Surveying and allotting	25	2,663.24
Traveling expenses	76, 77	99.45
Total		32,309.21

14. During the period from the beginning of the fiscal year 1857 and ending with the fiscal year 1866; the United States expended gratuitously for the benefit of the Seminole and Creek Nations of Indians the sum of \$1,852.75 for the following purposes:

Purpose	Gratuity Rept. G. A. O., page	Amount
Miscellaneous agency expenses	52	\$370.75
Pay of miscellaneous employees	52	1,027.00
Transportation, etc., of supplies	52	455.00
Total		1,852.75

[fol. 25] 15. During the period from the beginning of the fiscal year 1867 and ending with the fiscal year 1898, the United States expended gratuitously for the benefit of the Seminole and Creek Nations of Indians the sum of \$1,572.16 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Annuity expenses	53	\$1,316.66
Miscellaneous Agency expenses	54, 57	230.50
Pay of Interpreters	124	25.00
Total		1,572.16

16. During the fiscal years 1857 to 1934 the Seminole Tribe of Indians composed, approximately, 15 per cent of the total population of the Creek and Seminole Tribes, but

what portion of the expenditures set out in findings 14 and 15 was made for the benefit of the Creeks and what portion for the benefit of the Seminoles does not appear.

17. During the period from the beginning of the fiscal year 1867 to the end of the fiscal year 1898, the United States expended gratuitously for the benefit of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations of Indians the sum of \$305,292.80 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Agricultural implements and equipment.....	56, 58, 59, 68	\$152.20
Feed and care of livestock.....	56-59, 67	1,396.28
Fuel, light, and water.....	56-64, 67	791.50
General office expense.....	41-42	135,219.60
Hardware, glass, oils and paints.....	56, 59	11.24
Livestock.....	56, 58, 59	547.50
Medical attention.....	56-59	161.65
Miscellaneous agency expenses.....	56-64, 172	4,139.91
Pay and expenses of farmers.....	59	226.67
Pay and expenses of Indian police.....	58, 59, 63, 68, 123, 169	80,983.17
Pay of Indian agents.....	121, 125	37,389.53
Pay of miscellaneous employees.....	56-64, 73	43,857.75
Pay of skilled employees.....	56-59, 68	415.80
Total.....		305,292.80

18. During the period from the beginning of the fiscal year 1899 to the end of the fiscal year 1934 the United States expended gratuitously for the benefit of the Creek, Cherokee, Chickasaw, Choctaw, and Seminole Nations of Indians the sum of \$11,416,066.55 for the following purposes:

Purpose	Gratuity Rept. G. A. O. pages	Amount
Agricultural aid.....	23, 24, 166, 167, 168	\$24,331.81
Allotting.....	16, 17, 20	36.65
Appraising.....	44-47, 49	18,665.01
Appraising and selling lands.....	14-20	205,959.07
Appraisal and sale of restricted lands.....	26	24,999.20
Automobiles and repairs.....	22-24, 51, 70, 166-167, 180	23,799.99
Construction and maintenance of Claremore Hospital.....	50-51, 84, 92, 150-151	77,127.98
Copying allotment records.....	69	14,648.72
Education.....	28-36, 50-51, 83, 85-105, 106-114, 144-154, 167- 168.	2,179,846.86
Equalization of allotments, expenses.....	14, 16, 20, 47, 49	207.88
Examining records in disputed citizenship cases.....	44, 45, 49	26,105.59
Feed and care of horses.....	74-80, 139	3,371.96
Fuel, light, and water.....	64, 71	108.20
General office expenses.....	14, 16-20, 42-49	4,218,065.39
Household equipment.....	166-168	2,625.33
Incidental expenses.....	66-74, 80, 139-140	30,115.98
Investigating leases.....	116, 117	29,955.95

Purpose	Gratuity Rept. G. A. O. pages	Amount
Leasing of mineral and other land....	14, 16, 20, 42, 49	4,514.39
Livestock.....	68, 167, 168	1,290.00
Medical attention.....	51, 152, 154, 170, 177	976.41
Miscellaneous agency expenses.....	22-24, 51, 64-68, 70-72, 164-174	215,416.02
Oil and gas expense.....	16, 17, 19, 20	7,028.28
Oil and gas mining supervision, allotted lands.....	118, 119	85,703.40
Pay and expenses of farmers.....	23, 24, 81-83, 115	327,866.96
Pay and expenses of field matrons....	81-83	6,217.32
Pay and expenses of Indian police....	71, 72; 81-83, 123	174,860.56
Pay of Indian agents.....	121	30,250.00
Pay of clerks.....	120	4,721.62
Pay of Indian inspectors.....	79, 80, 122	22,381.97
Pay of interpreters.....	81-83, 164-168	125,783.64
Pay of miscellaneous employees.....	23, 51, 64, 67, 71, 72, 74- 83, 120, 139-140, 164- 168	1,717,185.80
Pay of superintendents.....	126, 167, 168	11,220.25
Per capita payment expenses.....	15, 66, 67	141.68
Preservation of records.....	128	8,886.62
Probate expense.....	72, 81-83, 121-136, 166, 168	1,053,120.71
Protecting property interests.....	137-138	386,847.59
Protecting property interests of re- stricted members.....	15-16	4,741.70
Provisions and other rations.....	167-168	139.27
Purchase of horses.....	77, 139	720.00
Removal of alienation restrictions....	159-161	88,346.12
Sale of allotted lands.....	15	265.12
Sale of restricted lands.....	15	1,577.09
Sale of town lots.....	15, 17, 18, 47, 49, 79, 80	250.44
Sale of town sites.....	47, 49	416.71
Sale of unallotted lands.....	15, 162	53,538.80
Surveying.....	15, 17, 18, 44-47	49,695.31
Surveying and allotting.....	25	7,331.24
Surveying segregated coal and asphalt lands.....	1v, 21	6.76
Surveying, sale, etc., of lands.....	71, 164-168	80,809.05
Timber estimating.....	15, 44	33,776.10
Transportation, etc., of supplies.....	56, 57, 60, 61, 64, 65, 71, 144-150, 166, 167, 174, 175	7,966.50
Traveling expenses.....	66, 74, 80, 139, 140, 176	22,401.55
Total.....		11,416,066.55

[fol. 27] 19. During the period from 1861 to 1897 the Seminole tribe of Indians composed approximately 4.38 per cent of the total population of the Cherokee, Creek, Chickasaw, Choctaw, and Seminole Nations, and from 1908 to 1928 it composed about 3.08 per cent thereof, and during the entire period from 1861 to 1928 it composed 3.72 per cent thereof; but what portion of the expenditures set out in findings 17 and 18 were spent for the benefit of the Seminole Nation does not appear by the proof.

CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover, and its petition is therefore dismissed.

OPINION

WHITAKER, Judge, delivered the opinion of the court:

This case was formerly before this court on plaintiff's original and amended petitions. Judgment was entered in favor of the plaintiff for \$1,317,087.27 (82 Ct. Cls. 135). We were reversed in part by the Supreme Court (299 U. S. 417) principally on the ground that the judgment embraced items set up for the first time in an amended petition which was filed after the expiration of the statutory period within which suit could be brought. Upon remand of the case here, judgment was entered in favor of the plaintiff for \$10,099.25.

Following this, on August 16, 1937, Congress passed the act set out in finding 2 giving plaintiff the right to amend its petition to conform to the evidence taken and conferring jurisdiction on this court to render judgment on the items set up for the first time in such amended petition. In pursuance thereto a second amended petition was filed on November 8, 1937.

[fol. 28] Claims Asserted in Paragraph III of Plaintiff's
Second Amended Petition (Findings 3 and 4)

In this paragraph plaintiff asserts a claim under a portion of article VII of the treaty of August 7, 1856 (11 Stat. 699, 702), and under a portion of article IX of said treaty. The total amount of the claim asserted is \$63,353.42. The amount of \$61,563.42 thereof arises under that provision of article VIII of the treaty of 1856 which reads as follows:

• • • the United States do therefore agree and stipulate as follows, viz: • • • to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them:

The balance of \$1,790 arises under that portion of article IX of the treaty set out in finding 4, under which the defendant agreed to spend the sum of \$20,000 in improvements after all the Florida Seminoles had removed to the "Seminole country west."

As set out in finding 3, the defendant has spent only \$10,436.58 of the total of \$72,000 due under said part of article VIII, leaving a balance due the plaintiff of \$61,563.42. Of the \$20,000 agreed to be spent for improvements, the defendant expended the total amount of \$18,210, leaving a balance of \$1,790, or a total due on the claim asserted in paragraph III of the petition of \$63,358.42. Judgment for this amount was rendered on the former trial, but the Supreme Court reversed as to both of these items (299 U. S. 424, 425) because they had been included for the first time in the amended petition filed after the expiration of the statute of limitations.

The amount of \$63,353.42 has not been expended by the defendant for the purposes set forth in the two above articles of the treaty. However, the act of July 5, 1862 (12 Stat. 512, 528), authorized the President to expend Seminole funds "for the relief and support of such individual members of said tribes" (the Seminoles among the number) "as have been driven from their homes and reduced to want on account of their friendship to the government." A total of \$242,731.88 thereof has been spent for the relief of refugee Indians. Of this amount \$31,599.68 was spent for the benefit of refugee Seminole Indians (pp. 28, 29, G. A. O. report, filed September 6, 1934). The expenditure of so much thereof was authorized by said act. It may be doubted that power resided in the Congress to authorize the expenditure of Seminole funds for the benefit of Indians of other tribes, but article VIII of the treaty of March 21, 1866 (14 Stat. 755, 759), provides:

The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for . . . all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States.

It will be noted that the ratification of the expenditures for this purpose relates not only to expenditures for destitute Seminole Indians, but to destitute Indians in general. Irrespective, therefore, of whether or not the expenditures were authorized when made, they were ratified by this treaty. This treaty further provided that the amounts to be paid under it were in full settlement for the expenditures from their funds for destitute Indians.

In our former opinion in this case we held that the ratification by the treaty of 1866 related to expenditures of annuity funds only. We reaffirm this holding, but we are of the opinion that the amounts stipulated for in the quoted portion of article VIII of the treaty of 1856 were annuities; that is to say, annual payments. We do not think that the word "annuities" is to be restricted to annual payments for per capita distribution to the tribe, but embraces all annual payments.

The amount expended for the relief of destitute Indians being in excess of the defendant's obligation under the quoted provision of article VIII of the treaty of 1856, it results that the plaintiff is not entitled to recover on this item.

[fol. 30] As to the item of \$1,790: The defendant obligated itself to expend the \$20,000 in improvements only "after they shall all remove" from Florida to the country west. The proof shows that of the 500 Seminoles in Florida, but 164 of them removed to the country west. Although the condition of the obligation was never met, the defendant spent \$18,210 of the total of \$20,000. This we think more than discharged its obligation, legal or moral, under this article of the treaty, and that, therefore, the plaintiff is not entitled to recover the item of \$1,790.

It results that the plaintiff is not entitled to recover any amount on account of the claim set forth in paragraph III of plaintiff's second amended petition.

Claim Asserted in Paragraph IV of Plaintiff's Second Amended Petition (Finding 5)

In this paragraph plaintiff asserts a claim under another portion of article VIII of the treaty of August 7, 1856 (11 Stat. 699, 702) which is set out in finding 5, and which, in substance, provides for the payment to the Seminoles per

capita of interest at 5 per cent on \$500,000. The plaintiff alleges that the defendant has either illegally disbursed or failed to disburse \$154,551.28 of the amount due under this portion of this article of the treaty.

On the former trial of this case the court entered judgment on this item for \$154,551.28. The Supreme Court reversed on two grounds: first, because a part of the amount claimed was due for a period not within that covered by the original petition; and, second, because the findings did not show that any portion of the fund had been illegally disbursed. Since the original petition was not grounded upon the failure to disburse, but only upon illegal disbursements, the Supreme Court held that there could be no recovery under the findings. The second amended petition, on the other hand, prays recovery both for illegal disbursements and for a failure to disburse.

In finding 5 there is set forth a statement of the years in which there was a deficit or an overpayment of the [fol. 31] amount of this interest. It appears that the excess of the deficits over the overpayments is \$92,423.74.

The table shows deficits for the years 1870-1874, both inclusive. In each of these years, however, payments were made out of this fund for purposes other than those specified in article VIII of the treaty in the amounts set out in the finding. These payments were made pursuant to resolutions of the Seminole General Council. The defendant claims credit for these amounts totalling \$66,422.64.

Article VIII of the treaty of 1856 provided that these payments should be made per capita for the benefit of each individual Indian, but whether or not it was an agreement for the benefit of each individual Indian, it was an agreement between the United States and the tribe and not the individuals. The Sac and Fox Indians, 220 U. S. 481. So that we are presented with a case where one of the contracting parties says to the other, I wish you would pay me this money so I can use it for another purpose I have in mind; if you will do so, I agree to relieve you of your obligation to make the per capita payments. If the other contracting party agrees and pays the money as requested, certainly the other party cannot later hold him liable for doing so.

In the year 1907, \$12,500 was paid to the United States Indian Agent. This payment was authorized by section 11

of the act of April 26, 1906 (34 Stat. 137, 141), which provides, in part:

That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rule and regulations to be prescribed by him; * * *

The \$92,423.74 must be credited, therefore, with the sum of \$78,922.64, leaving a balance due plaintiff under this portion of article VIII of the treaty of \$13,501.10.

[fol. 32] Claim asserted in paragraph V of plaintiff's second amended petition (Finding 6)

In this paragraph plaintiff asserts a claim for \$90,597.20 under that portion of article III of the treaty of March 21, 1866, (14 Stat. 755) in which the defendant agreed to pay annually 5 per cent interest on \$50,000, or \$2,500, for "the support of schools." In plaintiff's requested finding 8 the amount of this claim is reduced to \$61,347.20. In our former opinion (82 Ct. Cls. 135, 151-152) we held that payments made to the tribal treasury during the years 1875-1879, both inclusive, were unauthorized, and we gave judgment therefor in the amount of \$57,500, and also for underpayments for the years 1867-1874, both inclusive, amounting to \$3,097.20, and for an underpayment of \$750 for the year 1907, amounting in all to the sum of \$61,347.20. The Supreme Court reversed because the claims asserted were not within the statutory period, and because the original petition, as amended, was grounded only on a misapplication of the funds, and not on a mere failure to pay.

Even though the payments to the tribal treasurer during the years 1875-1879 may have been unauthorized, it appears that the tribal treasurer disbursed annually not less than \$2,500 in excess of amounts it was otherwise obligated to expend for the maintenance of its schools.¹ Since the

¹ Annual Reports of Commissioner of Indian Affairs: 1876, pp. 212-213; 1877, pp. 690-691; 1878, pp. 286-287; 1879, pp. 341-342; 1881, pp. 280-281; 1883, pp. 90, 250-251; 1844, pp. 270-271; 1886, pp. 146, 154; 1887, pp. 98, 110; 1888, pp. 113, 122; 1890, pp. 89, 94; 1891, pp. 240, 250; 1892, pp. 247, 256; 1893, pp. 143, 147; 1894, p. 140; 1895, pp. 155, 161; 1896, pp. 151-158.

schools actually got the money, it makes no difference that the payments were made through the agency of the tribal officials. The defendant would be liable, if at all, only if it appeared that the payments were not in fact made.

The \$750.00, which it is alleged was not paid for the year 1907, was paid to the Indian Agent under the authority of section 11 of the act of April 26, 1906 (34 Stat. 137), heretofore quoted.

However, the plaintiff is entitled to recover the underpayments during the fiscal years 1867-1874, both inclusive, in the amount of \$3,097.20.

[fol. 33] Claim asserted under paragraph VI of plaintiff's second amended petition (Finding 7)

In this paragraph plaintiff asserts a claim for \$10,000 under the provisions of article VI of the treaty of March 21, 1866 (14 Stat. 755), under the terms of which the United States agreed that it would erect an agency building on the Seminole reservation "at an expense not exceeding ten thousand (\$10,000) dollars."

In the original opinion in this case it was held that the plaintiff was entitled to recover \$9,068.24, being the balance of \$10,000 after the deduction of \$931.76 shown to have been spent for "agency buildings and repairs." The Supreme Court reversed as to this item because not within the period alleged in the original petition. The plaintiff in its present brief admits that it is entitled to recover under this item no more than \$9,068.24.

Congress by the act of July 28, 1866 (14 Stat. 319), appropriated the sum of \$10,000 for this purpose, but this amount was not used and was returned to surplus. By the act of May 18, 1872 (17 Stat. 132), the sum of \$20,000 was appropriated to replace the appropriation of 1866 returned to surplus and for the erection of an agency building pursuant to the Creek treaty. It appears from the report of the General Accounting Office, filed herein on September 6, 1934, pages 20, 25, and 27, that \$9,030.15 of the \$10,000 appropriated for the Seminole Agency was expended for some purpose, since on July 31, 1875, \$969.85 of that part of the appropriation due the Seminoles was returned to surplus; but it does not appear for what purpose it was used. However, it appears from the report of the Commissioner of Indian Affairs for 1873, pages 211 and 212, that an

agency building was erected on the Seminole reservation in that year. Whether or not the \$9,030.15 was used for this purpose, it nevertheless appears that an agency building was erected and there is no showing by the plaintiff that it was not suitable. Article VI of the treaty of March 21, 1866, provided merely for the erection of "suitable agency buildings" "at an expense *not exceeding* ten thousand [fol. 34] (\$10,000) dollars." [Italics ours.] It appears that agency buildings have been erected and there is no showing that they were not suitable. Therefore, there has been no violation of this article of the treaty.

Claim asserted under paragraph VII of plaintiff's second amended petition (Finding 8)

In this paragraph the plaintiff asserts a claim for all moneys paid to its tribal treasurer after the passage of the Curtis Act of June 28, 1898 (30 Stat. 495). The total amount of these payments was \$864,702.58. Of this amount \$212,500 was paid to fulfill the obligation of article VIII of the treaty of 1856 providing for per capita payments of \$25,000 per annum; \$29,750 of it was to fulfill the obligation of article III of the treaty of 1866 providing for the payment of interest at 5 per cent on \$50,000 for school purposes, and 5 per cent interest on \$20,000 for the support of the Seminole government; \$622,156.87 of it was to fulfill the obligations of section 12 of the act of March 2, 1889 (25 Stat. 980, 1004), which provided for the payment of interest at 5 per cent per annum on \$1,500,000 "to be paid semi-annually to the treasurer of said nation." The remainder of \$295.71 is "proceeds of labor."

Plaintiff says that the payment of these moneys to the tribal treasurer was prohibited by section 19 of the Curtis Act (30 Stat. 495), which reads as follows:

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; *and per capita payments shall be made direct to each individual in lawful money of the United States*, and the same shall not be liable to the payment of any previously contracted obligation. [Italics ours.]

Defendant replies that this section was not intended to apply to any moneys except those required to be distributed per capita among members of the tribe; and, further, that [fol. 35] although unlawfully made, the plaintiff is estopped to complain thereof; and, thirdly, that if unlawfully made, the defendant is entitled to a credit for the payments as gratuities.

On the former trial of this case this court held that all the payments to the tribal treasurer were prohibited by section 19 of the Curtis Act, which section we held applied to the Seminole Nation, and that the plaintiff was entitled to judgment for the entire amount. The Supreme Court reversed, first, on the ground that the original petition was based upon the defendant's alleged refusal to make payments to the tribal treasurer; and, second, that the amended petition, which for the first time complained of the payment of these sums to the tribal treasurer, was filed after the expiration of the statutory period.

We reaffirm our former opinion in this case to the effect that section 19 was intended to apply to the plaintiff. The Secretary of the Interior in making the payments to the tribal treasurer was acting under the authority of an opinion of the Assistant Comptroller of the Treasury. In that opinion the Comptroller held that the Seminole agreement ratified July 1, 1898 (30 Stat. 567), providing as it did for the continuation of existing treaties between the Seminoles and the United States, made section 19 of the Curtis Act inapplicable to the Seminole Nation. He was of the opinion that under these treaties the Secretary of the Interior was authorized to pay funds due the tribe into the tribal treasury; but, as we held in our former opinion, the authority to pay these funds to the tribal treasurer was derived not from a treaty but from the act of April 15, 1874 (18 Stat. 29), which authorized such a disbursement, provided the Council of the tribe agreed thereto. We do not think that the Seminole agreement providing for the continuation of existing treaties had in contemplation an agreement entered into under this Act. It is hardly conceivable that on June 28, 1898, Congress should have passed an Act prohibiting the making of certain payments to the tribal treasurers of all the Five Civilized Tribes, which included the Seminole Nation, and three days later should have passed an Act [fol. 36] repealing this provision as to the Seminoles. We

are of opinion that the prohibition of the Curtis Act applied to the Seminoles.

However, on further consideration, we think the prohibition of section 19 of the Curtis Act had application only to per capita payments. In the first clause of that section it is provided—

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement; . . .

but the meaning of this clause is modified by the following one, which reads:

. . . but payments of all sums *to members of said tribes* shall be made under direction of the Secretary of the Interior by an officer appointed by him; . . . [Italics ours.]

The succeeding clause directs how these officers shall make these payments to members of the tribes. It provides:

. . . and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

Except for the second clause of this section, it is perhaps true that the Act would have prohibited the payment to the tribal treasurer of all sums of whatever character and for whatever purpose they were to be used; but the word "but" in the beginning of the second clause connects the second clause to the first and shows that Congress had in mind only the payments due to members of the tribe.

The tribal government in the Seminole Nation was continued after the passage of the Curtis Act, and the former restriction on the enactments of the General Council of the tribe requiring their approval by the President of the United States was removed by the Seminole agreement. The removal of this restriction is inconsistent with a purpose to deprive them of their right to collect moneys due the tribe.

Moreover, as the defendant points out in its brief, the Curtis Act, as originally drawn, directed that not only pay- [fol. 37] ments of sums to members of the tribe should be

made by an officer appointed by the Secretary of the Interior, but also provided that "payments of all expenses incurred in transacting their business" should be so made. When the Act was finally passed, this clause relating to the payment of expenses incurred in transacting their business was eliminated.

We conclude, therefore, that while section 19 of the Curtis Act is applicable to the Seminole Nation, it prohibited the payment to the tribal treasurer of per capita payments only. *Choctaw Nation v. United States*, 91 Ct. Cls. 320. These payments amounted to the sum of \$212,500.

But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States. *The Sac and Fox Indians*, supra.

It is not disputed that the tribe got the money. It was paid to it in pursuance of a request of its General Council. Plainly, therefore, the Nation cannot maintain an action for the payment of it a second time. It is only the Nation which is authorized to sue by the jurisdictional act.

It results that the plaintiff is not entitled to recover on this item.

Defendant's Counterclaims

1. Defendant's claim for an offset as set out in Finding 9

By the act of July 27, 1868 (15 Stat. 199, 214), Congress appropriated \$31,083.79 for subsisting the Seminole Indians, and provided that that amount should be deducted from any funds belonging to them. This amount was expended, but has not been deducted from the funds due them. The plaintiff admits that the defendant is entitled to this offset. We agree.

[fol. 38] 2. Defendant's claim for an amount of lands deeded plaintiff in addition to the tract provided for by the treaty of 1866 (Finding 10)

Under the treaty of 1866 the defendant undertook to provide 200,000 acres of land for the use of the Seminoles.

The east boundary of this tract was to be the west boundary of the Creek reservation. The plaintiff, however, was erroneously located partly on the Creek reservation. When this error was discovered the defendant purchased from the Creek nation 175,000 acres of its lands located east of and adjoining the Seminole reservation, for a consideration of \$175,000. The eastern boundary of this tract, however, was run so as to include not 175,000 acres, but 177,397.71 acres.

When the west boundary was located it developed that the total number of acres in the reservation, exclusive of the 177,397.71 acres above referred to, was 188,449.46 acres, or 11,550.54 less than the 200,000 acres which the defendant was obligated to furnish under the treaty of 1866. The defendant claims an offset of the difference between the 177,397.71 acres and the 11,550.54 acres at \$1.00 per acre.

The defendant was obligated by treaty to purchase only 200,000 acres of land and therefore under the act of August 12, 1935 (49 Stat. 571, 596) it is entitled to an offset for the additional acreage purchased. This was 165,847.17 acres, the purchase price of which was \$165,847.17. The defendant is entitled to an offset of this amount under the above-mentioned act, section 2 of which directs this court—

* * * to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band.

3. Defendant's claim of gratuity payments as set out in Finding 11

The defendant claims that from 1857 to 1866, both inclusive, it expended gratuitously for the benefit of the Seminole Nation the sum of \$42,861.54 for various purposes, as set out in Finding 11.

In defense the plaintiff insists, first, that the Act of August 12, 1935, has application only to cases that had not [fol. 39] been tried or submitted, and that this case had been tried or submitted prior to the passage of that Act. We think there is no merit in this contention. It had been tried and submitted in this court, but the Supreme Court reversed principally because many of the claims were first asserted after the expiration of the statutory period within which suit could be brought. After an amendatory act was

passed enlarging the period of limitations, a second amended petition was filed setting up these claims. It seems manifest that as to all issues not finally disposed of at the former trial this is not a case that had been tried or submitted.

Secondly, the plaintiff says that many of the expenditures set out in finding 11 were required by treaty. If this be true, of course the defendant is not entitled to the offset.

The first item is for agency buildings and repairs, \$5,200. The plaintiff says these expenditures were required by article XII of the treaty of August 7, 1856 (11 Stat. 699), which provides, in part:

So soon as the Seminoles west shall have moved to the new country herein provided for them, the United States will then select a site and erect the necessary buildings for an agency, including a Council house for the Seminoles.

The defendant replies that this obligation was discharged by the expenditure of \$720 for a Council house and \$4,950 for erecting agency buildings. Both of these amounts and the \$5,200 claimed as a gratuity were spent under appropriation acts appropriating money for agency buildings and repairs, both of which were passed shortly subsequent to the treaty of 1856, one on February 28, 1859, and the other on June 19, 1860. The obligation of the treaty was to erect "necessary" agency buildings. It seems clear that the total amount spent was spent to fulfill the obligations of the treaty and that the defendant is not entitled to this offset.

The next item is "clothing, \$610.00." This amount was expended in the year 1866 pursuant to the Appropriation Act of March 3, 1865 (13 Stat. 541). Under article IX of the treaty of 1856 the defendant obligated itself to remove the Florida Seminoles to the west, and to furnish them [fol. 40] with certain specified articles of clothing. The report of the Commissioner of Indian Affairs of 1858 shows that the Florida Seminoles went to the west in 1858. On March 3, 1857, Congress appropriated the sum of \$120,000 to fulfill the obligations of this article of the treaty. The report of the General Accounting Office filed September 9, 1934, shows that the sum of \$88,697.05 was disbursed for this purpose. This presumably discharged this obligation of the treaty and the disbursement of \$610 in 1866, eight years after the migration, must have been a gratuity. The defendant is, therefore, entitled to this offset.

The next item is "Education, \$2,500.00." This offset the plaintiff concedes the defendant is entitled to. We agree.

The next item is "Expenses of delegates, \$5,155.70." This amount was spent in the year 1857. The plaintiff says this was spent pursuant to article XXIII of the treaty of 1856 (11 Stat. 705), which provides:

A liberal allowance shall be made to each of the delegations signing this convention . . . as a compensation for their travelling and other expenses in coming to and remaining in this city and returning home.

The defendant replies that the obligation of this article was satisfied by the Appropriation Act of March 3, 1857 (11 Stat. 175), appropriating the sum of \$11,000.00—

. . . for the travelling and other expenses of the members of the Creek and Seminole delegations (including the agents and the interpreter for the latter) in coming to Washington, remaining, and returning home, per twenty-third article treaty seventh August, eighteen hundred and fifty-six, . . .

The report of the General Accounting Office, however, does not show a disbursement of this money, but it does show this disbursement of \$5,155.70 for "Expenses of delegates." Since no other expenditure is shown to fulfill this obligation, we think it fair to assume that the claimed gratuity must have been spent therefor. It results the defendant is not entitled to this offset.

Next to the last item is "Presents, \$168.80." The defendant was under no obligation to give "presents" to the plaintiff, and while it may be considered bad form to charge a "present" to the donee, the defendant is nevertheless entitled to this offset under the act of August 12, 1935.

The final item is "Provisions and other rations, \$4,657.57." The plaintiff says that this sum was spent to fulfill the obligation of article IX of the treaty of 1856, which obligated the defendant to remove to the west the Seminoles then in Florida, and to provide them with subsistence during their removal and for twelve months thereafter, and also to provide them with certain specified articles of clothing, etc. The Florida Seminoles removed to the west in 1858. All of the above amounts, except \$300.00, were spent from 1860-1866. We hold, therefore, that the defendant is

entitled to an offset on account of this item in the amount of \$4,357.57.

The remaining items are "Fuel, light, and water, \$98.50," "Miscellaneous agency expenses, \$1,239.50," "Pay of Indian Agents, \$15,475.05," "Pay of Interpreters, \$3,910.00," "Pay of miscellaneous employees, \$158.50" and "Transportation, etc., of supplies, \$3,687.92."

The plaintiff points out in its brief that the treaty of 1856 required the United States to remove intruders from the Indian domain, to issue licenses to such persons as were authorized to trade within the domain, to protect them from domestic strife, hostile invasion, and from aggression from other Indians and white persons; and that the treaty also required the United States to pay the Seminoles certain sums, to pay interest on funds to be distributed per capita, to remove the Seminoles in Florida to the west, and to provide them with rations and subsistence for a certain period, and to distribute among them clothing, to pay delegations of Seminoles to Florida, and to survey the boundaries of the reservation. It says that agents, interpreters, employees and agencies were necessary in order for the United States to carry out these obligations of the treaty.

However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of *Blackfeet, et al. Tribes v. United States*, 81 Ct. Cls. 101, 137, and *Shoshone Tribe v. United States*, 82 Ct. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets.

[fol. 42] It results that the defendant is entitled to offset \$32,205.84 on account of the items set out in this finding.

4. Defendant's claim of grantuity payments as set out in Finding 12

The plaintiff's position with respect to the items claimed in this finding is that these sums were spent to fulfill the obligation of treaties.

The first item under this finding is "Education, \$171.89." It seems clear that the defendant is entitled to this offset.

The next item is "Expenses of delegations, \$4,309.00." We find no obligation in any treaty requiring the defendant to pay the expenses of any Indian delegation to Washington.

Nor do we find any obligation on the part of the defendant to feed and care for the plaintiff's livestock.

Items similar to the items of "Fuel, light, and water," "Miscellaneous agency expenses," "Pay of Indian Agents," "Pay of interpreters," "Pay of miscellaneous employees," and "Transportation, etc., of supplies" have been heretofore dealt with.

The plaintiff admits that the defendant is entitled to an offset for the item of "medical attention." We agree.

We have heretofore dealt with an item similar to the item of "Provisions and other rations."

It results that the defendant is entitled to offset \$27,720.90 on account of the items set out in this finding.

5. Defendant's claim of gratuity payments as set out in Finding 13

The defendant claims an offset of the following items set out in this finding: appraising, enrolling, preservation of records, probate expenses, protecting property interests, sale of town sites, surveying, surveying and allotting, and traveling expenses. The plaintiff takes the position that the defendant incurred these expenses in carrying out the obligations of its agreements with the plaintiff.

By the treaty of August 7, 1856 (11 Stat. 699), certain lands were granted to the Seminoles west of the Mississippi River to be held by the tribe in common. In article IV of [fol. 43] that treaty it was provided that no portion of the land conveyed "shall ever be embraced or included within, or annexed to, any Territory or State, nor shall . . . ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same." That same treaty in article XV provided that the "Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their respective limits; . . ."

However, by 1893 white people had crowded into this Indian reservation in such numbers that they far outnumbered the Indians and so it became desirable, if not imperative, to abolish the tribal governments in this territory and to bring it under the dominion of the laws of the United States.

In view of this situation, Congress, on March 3, 1893, passed an act (27 Stat. 645) appointing a commission to enter into negotiations with the tribes

* * * for the purpose of the extinguishment of the national or tribal title to any lands within that Territory

• • • either by cession of the same or some part thereof to the United States, or by the allotment and division of the same in severalty among the Indians of such nations or tribes, • • • with a view to such and [an] adjustment • • • as may • • • be requisite and suitable to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory.

The act directed the commissioners to undertake to secure an agreement from the Indian tribes permitting an allotment of the lands in severalty, upon the accomplishment of which they were directed to "cause the lands of any such nation or tribe or band to be surveyed, and the proper allotment to be designated." The amount of \$50,000 was appropriated for the carrying out of the commission.

Acting under the authority thereby vested, the commission entered into agreements with the various tribes in the Indian territory providing for the allotment of the tribal lands to the members of the tribe. The agreement with the Seminoles was ratified on July 1, 1898 (30 Stat. 567). Under that agreement it was provided "that all lands belonging [fol. 44] to the Seminole tribe of Indians • • • shall be divided among the members of the tribe so that each shall have an equal share thereof in value • • • Such allotment shall be made under the direction and supervision of the commission to the Five Civilized Tribes in connection with the representative appointed by the tribal government. • • •" This agreement further provided for the exclusion from lands to be allotted of certain coal, mineral, oil, and natural gas lands, etc., for the leasing and sale thereof, and for the payment to the individual members of the tribe of the proceeds thereof, together with such other money as might be in the hands of the United States belonging to the tribe.

There was no express provision in the Seminole agreement that the United States should bear the expense of the allotment of the Seminole lands, and the majority of the Court is of the opinion that an obligation to do so cannot be implied. *Choctaw Nation v. United States*, 91 Ct. Cls. 320.

We hold, accordingly, the defendant is entitled to an offset of the above-mentioned items.

The plaintiff seems to admit that the defendant is entitled to an offset for the following items: clothing, expenses of delegates, livestock, medical attention, provisions and other rations. We think it is.

We have heretofore dealt with items of general office expenses, miscellaneous agency expenses, pay of miscellaneous employees, and per capita payment expenses. This leaves in dispute the item "Education, \$20,377.89."

In 1904, according to the report of Special Agent Churchill, appointed by the Secretary of the Interior,¹ there were upwards of 100,000 persons of school age residing in the Indian territory who were not eligible to attend the tribal schools and were without free education.

By the Act of April 21, 1904 (33 Stat. 189, 215) Congress appropriated \$100,000 for the maintenance, strengthening and enlarging of the tribal schools of the Creek, Cherokee, Chickasaw, Choctaw and Seminole Nations. Provision was made for the attendance of children of noncitizens. From that time on the schools in the territory were maintained both for members of the tribes and also for white people [fol. 45] and negroes who were not members of the tribes. The report of the Commissioner of Indian Affairs in 1906, pp. 129-131, shows that in the fiscal year ending June 30, 1906, there were enrolled in the various schools in Indian territory 10,832 Indians, 43,011 whites, and 6,104 negroes. The schools were maintained both by appropriations from Congress and also by tribal funds. (See report of the Commissioner of Indian Affairs for 1905, p. 108.)

Since these sums were spent not only for the benefit of the plaintiff, but also for the benefit of white and negro children, it is manifestly improper to charge them against the plaintiff as gratuities, especially since tribal funds were contributed to the support of the schools.

It results that the defendant is entitled to an offset of the amounts listed in finding 13 in the sum of \$32,309.21.

6. Amounts claimed as offsets, as set out in findings 14, 15, 17 and 18

In findings 14 and 15 the defendant seeks an offset of 15 per cent of the amounts spent for the joint benefit of the

¹ House Document No. 522, 57th Cong., 1st sess., pp. 9, 32.

Seminole and Creek Indians, on the theory that the members of the Seminole Nation comprised about 15 per cent of the total population of the Creek and Seminole tribes. The proof does not show how much of the aggregate amount was actually spent for the benefit of the Seminoles and how much for the benefit of the Creeks, but on the basis of prior decisions of this court and of the Supreme Court (see *The Sisseton and Wahpeton Bands of Indians v. United States*, 42 Ct. Cls. 416, 429; 208 U. S. 561, 567) the defendant would be entitled to an offset of 15 per cent of the total amount spent, since the membership in the Seminole tribe was 15 per-cent of the total membership of the Creeks and Seminoles. This amounts to \$513.74.

Defendant also seeks an offset of $4\frac{1}{2}$ per cent of the amounts set out in findings 17 and 18, which were spent for the benefit of the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations, because the members of the Seminole tribe are said to have composed approximately $4\frac{1}{2}$ per cent of the total population of all the tribes. As in the case of amounts spent for the Creeks and Seminoles jointly, there is no proof as to what percentage of the amount spent [fol. 46] for these five tribes was actually spent for the benefit of the Seminoles, but the proof does show that from 1861 to 1928 the Seminoles composed about 3.72 per cent of the total population of the five tribes. On the basis of the decisions cited supra the defendant is therefore entitled to an offset of 3.72 per cent of the total amount spent for the items listed in findings 17 and 18, amounting to \$436,034.57.

It results that the plaintiff is entitled to recover of the defendant the sum of \$16,598.30, made up of the following items:

Plaintiff's second amended petition:

Paragraph III, findings 3 and 4	\$0.00
“ IV, finding 5	13,501.10
“ V, “ 6	3,097.20
“ VI, “ 7	0.00
“ VII, “ 8	0.00
Total	16,598.30

and that the defendant is entitled to an offset against this of \$725,715.22, made up of the following items:

Finding 9	\$31,083.79
" 10	165,847.17
" 11	32,205.84
" 12	27,720.90
" 13	32,309.21
Findings 14 and 15	513.74
" 17 and 18	436,034.57
Total	725,715.22

Plaintiff's petition must therefore be dismissed. It is so ordered.

Littleton, Judge; Green, Judge; and Whaley, Chief Justice, concur.

[fols. 47-48] VI. JUDGMENT OF THE COURT—January 6, 1941

Upon the special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiff is not entitled to recover.

It Is Therefore Adjudged and Ordered that the plaintiff's petition be and the same is hereby dismissed.

VII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On March 5, 1941, the plaintiff filed a motion for a new trial.

On May 5, 1941, the court entered the following opinion and order on said motion:

[fol. 49] VII. OPINION ON PLAINTIFF'S MOTION FOR NEW TRIAL—Filed May 5, 1941

Mr. Paul M. Niebell for the plaintiff. Mr. W. W. Pryor was on the briefs.

Mr. Wilfred Hearn, with whom was Mr. Assistant Attorney General Norman M. Littell, for the defendant. Mr. Raymond T. Nagle was on the brief.

ON MOTION FOR A NEW TRIAL

WHITAKER, Judge, delivered the opinion of the court:

1. The plaintiff in its motion for a new trial says that in our opinion filed on January 6, 1941, we misconstrued the provision of article IX of the treaty of August 7, 1856. It

says the expression "after ~~they~~ shall all remove" refers to all of those Seminoles who could be induced to remove, and not to all of the Seminoles in Florida. Upon reconsideration we conclude that plaintiff is right. Under this article the United States agreed to remove to the country west "all those Seminoles now in Florida who can be induced to emigrate thereto." It also agreed to furnish "them" with sufficient rations during "their" removal and for twelve months after "their" arrival at "their" new homes. The words "them" and "their" refer, of course, to those Seminoles who had been induced to emigrate. So, when it was agreed, in conclusion, to "expend for them in improvements [fol. 50] after they shall all remove the sum of twenty thousand dollars," the parties had reference to those Seminoles who could be induced to remove, and not to all the Seminoles in Florida. It is clear that when the treaty was agreed upon the parties contemplated that all of the Seminoles in Florida could not be induced to remove. Surely the defendant did not mean to agree to spend the \$20,000 only on a condition it believed would never be met.

But, it has been suggested that, even though the obligation to spend this \$20,000 in improvements arose on arrival in their new homes of all those Seminoles who could be induced to remove, yet the plaintiff is not entitled to recover, because that was an agreement for the benefit of individual Indians and not for the benefit of the tribe as a whole. The agreement was to spend for the immigrant Florida Seminoles \$20,000 in improvements. It is not expressly stated whether the improvements to be made were public or private improvements, that is, whether they were to be for the common benefit of the Indians as a whole, or for the benefit of each individual; but we assume they were for the common benefit, since no individual owned any particular parcel of land, but all of them owned it all in common.

Does the fact that these improvements were to be for the benefit of the immigrant Florida Seminoles prevent the plaintiff nation from suing to recover the unexpended portion thereof? The Florida Seminoles after their arrival at the Seminole reservation in the west were no longer, if ever, a separate entity. On arrival they became amalgamated with the other members of the tribe and lost whatever identity they may have had. Whatever improvements were made with the \$18,210.00 that was spent were not set apart for the exclusive use of these Florida Seminoles but inured

to the benefit of the whole tribe. No doubt the newcomers were quartered on arrival in an unoccupied part of the reservation, and the improvements were made there and so insured particularly to their benefit; but there is nothing to show that they were intended for their exclusive benefit. Improvements on the entire reservation were enjoyed by the entire tribe in common. The newcomers had an interest in the improvements already on the reservation in common [fol. 51] with the other members of the tribe, and the earlier arrivals had an interest in the improvements made on the lands occupied by the newcomers in common with them. Neither any individual among those who emigrated from Florida, or the group as a whole acquired title to these improvements to the exclusion of the other members of the tribe.

From the foregoing it seems clear that the cases of *Cherokee Nation v. United States*, 80 C. Cls. 1, *Sioux Tribe v. United States*, 89 C. Cls. 31, and *Blackfeather v. United States*, 37 C. Cls. 233, 190 U. S. 368, have no application. The *Cherokee* case was brought by only a portion of the tribe and for their benefit to the exclusion of other members of the tribe, and the *Sioux* case was grounded on a failure to pay certain individuals what they were individually entitled to, as was also the *Blackfeather* case. In the *Cherokee* case the suit was brought by the Cherokees by blood for their benefit to the exclusion of the Cherokees by adoption. In the *Sioux Tribe* case the suit was to recover amounts to which individual members were entitled when they devoted their allotments to agricultural purposes. The *Blackfeather* case was brought for the benefit of the individual members of the tribe whose property had been damaged or destroyed by depredations.

It results that the plaintiff is entitled to recover the unexpended balance of the \$20,000, or \$1,790. The opinion heretofore filed on January 6, 1941, is amended in accordance herewith.

2. In our opinion filed on January 6, 1941, we held that the defendant was entitled to an offset of all the items listed in finding 13, except the item of "Education, \$20,377.89." By inadvertence, however, we failed to deduct this amount from the total of the items set out in this finding. Accordingly, the figures "\$32,309.21" in the last line of the second full paragraph of the opinion on page 31 must be eliminated

and the figures "\$11,931.32" substituted therefor. The thirteenth finding on page 10 of the opinion will be amended by striking the word "gratuitously" in the third line thereof, putting a comma in the place of the semicolon at the end of the fourth line thereof, and adding after the comma the following: "all of which, except \$20,377.89 for education, was spent gratuitously."

[fol. 52] The foregoing changes will make the second to the last paragraph of the opinion read as follows:

It results that the plaintiff is entitled to recover of the defendant the sum of \$18,388.30, made up of the following items:

Plaintiff's second amended petition:

Paragraph III, findings 3 and 4	\$1,790.00
" IV, finding 5	13,501.10
" V, " 6	3,097.20
" VI, " 7	0.00
" VII, " 8	0.00
Total	18,388.30

and that the defendant is entitled to an offset against this of \$705,337.33, made up of the following items:

Finding 9	\$31,083.79
" 10	165,847.17
" 11	32,205.84
" 12	27,720.90
" 13	11,931.32
Findings 14 and 15	513.74
" 17 and 18	436,034.57
Total	705,337.33

The plaintiff's motion for a new trial is allowed and the former findings of fact and opinion are amended in accordance with the foregoing opinion. It is so ordered.

Green, Judge; Littleton, Judge; and Whaley, Chief Justice, concur.

[fols. 53-54] VIII. ORDER OF COURT AMENDING FINDINGS—
Filed May 5, 1941

On consideration of the motion for a new trial filed herein by the plaintiff, it is ordered that the findings of fact here-

tofore filed on January 6, 1941 be, and the same hereby are, amended in the following respects, to-wit:

By striking the word "gratuitously" in the third line of the thirteenth finding of fact and the semi-colon at the end of the fourth line thereof, and the substitution in lieu thereof of a comma, and the addition after the comma of the following, to wit: "all of which, except \$20,377.89 for education, was spent gratuitously:".

In all other respects the findings of fact and the conclusion of law heretofore filed on January 6, 1941 will stand. The opinion will be amended in accordance with a memorandum opinion this day filed.

By the Court.

Richard S. Whaley, Chief Justice.

[fol. 55] STIPULATED PORTIONS OF RECORD MATERIAL TO
ERRORS ASSIGNED—Filed July 12, 1941

Whereas, plaintiff proposes to file a petition for a writ of certiorari in the Supreme Court of the United States to review the judgment of the Court entered herein on January 6, 1941, motion for new trial denied May 5, 1941, and has requested the Court to certify a transcript of the record for such purpose, and

Whereas, error has been assigned to the effect that there is a lack of substantial evidence to sustain certain of the [fol. 56] findings of fact, namely:

As to Item 2 particularly—in finding, contrary to the evidence adduced, that the following amounts appropriated to fulfill Article 8 of the Treaty of August 7, 1856—requiring said moneys appropriated to be disbursed per capita to members of said tribe—were disbursed by the United States for the benefit of the Seminole Nation:

1870	\$17,821.00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

As to the counterclaims allowed, the lower court erred in holding and finding:

4. That the petitioner is chargeable with any part of the items of Education, Sale of town lots, Sale of town sites,

Probate expenses, General Office Expense, Surveying Segregated Coal and Asphalt Lands; and other like items of gratuity offset, without substantial evidence in the record to support such a charge against the petitioner.

And Whereas, it is the desire of both parties to confine the review of the evidence to the specific assignments of error above set forth, and to limit the volume of the evidence to be certified for the purpose of considering such assignments.

It is stipulated and agreed that in order to avoid the necessity of filing with the Clerk of the Court copies of such parts of the evidence as defendant considers should become a part [fol. 57] of the record to be certified, as provided in Rule 99 (b) the following is stipulated and agreed upon in lieu of such filing, and shall be of equal effect:

It is, therefore, stipulated and agreed that in addition to matters of which the Court may take judicial notice, the evidence before the Court from which the Court made the findings of fact, asserted in said assignments of error to have been made without substantial evidence in support thereof, was:

Finding 5

As to that portion of said finding mentioned in assignment of error referred to above, as "item 2", the evidence consists of a Supplementary Report of the Comptroller General of the United States, dated October 20, 1938, filed and received in evidence December 27, 1938, pertinent extracts from which and from exhibits attached thereto are as follows:

[fol. 58] Comptroller General of the United States

Washington, Oct. 20, 1938.

A-31090.

The Honorable,
The Attorney General.

Ct. Cls. No. L-51

SEMINOLE NATION OF INDIANS

v.

THE UNITED STATES

SIR:

Further reference is made to your letter dated September 19, 1938, relative to the above entitled cause as follows:

"In order that the Government's defence to certain of the claims asserted by plaintiff in the above-styled cause may be properly presented, it is deemed expedient that your office make a report supplementing its report of September 29, 1933, made in connection with this case, the report to cover the following items:

"1. State an account of moneys appropriated and disbursed subsequent to June 30, 1866, as interest on the \$500,000 Trust Fund established under Article VIII of the Treaty of 1856. (11 Stat. 699.)

"It is desired that such statement show:

(a) What disposition is shown to have been made of that part of the money appropriated to cover interest for the fiscal years 1867, 1868, 1871, 1872, 1873, 1876 and 1907, not shown to have been paid out per capita. (Report G. A. O., pp. 151-154.) If any of the money was paid to the tribal treasurer of the Seminole Nation, you are requested to exhibit as a part of your report photostatic copies of all acts of the Seminole General Council and demands or requests on behalf of the Seminole Nation that such payments be so made.

"(b) Photostatic copies of the act of the General Council of April 8, 1870, requesting that \$17,821 be paid to certain individuals (settlement No. 7243-1870; Report G. A. O., p. 152).

"(c) Photostatic copy of the acts of the General Council for the Seminole Nation of April 28, 1874, authorizing the payment of drafts of the Seminole Nation (settlement No. 5968-1874; Report G. A. O., p. 153).

"(d) Photostatic copy of any and all receipts given by an officer, or representative, of the Seminole Nation for moneys paid on account of the interest covering *said years*.

With reference to item 1, your attention is invited to the enclosed statements, Nos. 1 and 2 marked "Exhibit A". Statement No. 1 covers the period from 1867 to 1906 and sets forth the information requested.

Respectfully, (Signed) R. N. Elliott, Acting Comptroller General of the United States.

(Following are extracts from various Exhibits attached to the supplemental report of the Comptroller General dated October 20, 1938.)

[fol. 59]

EXHIBIT A
Statement No. 1
Disbursements

Fiscal Year	Per Capita Payments Allowed	Cash Payments to Individuals	Payments to Seminole Treasurer Disallowed	Payment of Drafts on Seminoles
1870	\$19,679.00	(a) \$17,821.00		
1871	12,500.00		(b) \$12,500.00	
1872	12,374.55		(c) 12,500.00	
1873	12,401.00		(d) 12,500.00	
1874				(f) \$11,101.64

Notes:

- (a) See Exhibit (B)
- (b) See Exhibits (C and D)
- (c) See Exhibits (E and F)
- (d) See Exhibits (G and H)
- (f) See Exhibit (L)

[fol. 60]

EXHIBIT "B"

Be it enacted by the General Council of the Seminole Nation, this 8th day of April 1870 That Capt. T. A. Baldwin U. S. Agent be and he is hereby authorized to pay the amount of Seventeen Thousand Eight hundred and twenty one Dollars, (17,821) to the following Individuals out of money now placed in his hands for our Nation as annuity—etc. After the manner and in the sums hereinafter prescribed.

Names of Individuals	Dollars	Cents	Remarks
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[The list of creditors to whom payments were made, showing names, amounts, totaling \$17,821.00, and explanatory remarks, here follows:]

[Signed.] John Jumper Chief (his x mark). Long John Chief (his x mark). Nuth Cap Hays (his x mark). Fors Hut Chubby (his x mark).

Witness to signatures: John Brown, Clk. General Council.

[fol. 61]

EXHIBIT "C"

Whereas the Seminole Nation is indebted in the Sum of Nineteen Thousand Eight hundred and Seventy four dollars, and Sixty Seven cents (\$19,874.67) as salaries to its officers, and other necessary expenses incurred in operating the machinery of its government; and whereas many of the accounts before us, presented for payment, are long

past due and unpaid on account of not having the proper amount of money at our disposal; and being anxious to liquidate the entire amount at an early — day as possible; and having no other means within our reach to apply to the same:

Now, therefore, Be it enacted by the General Council of the Seminole Nation that Henry Breiner U. S. Indian Agent for the Seminoles, be, and he is hereby required to pay into the treasury of the Seminole Nation the Sum of twelve thousand five hundred dollars (\$12,500) as annuity accruing by force of treaty Stipulation, and due on the 1st and 2nd quarters 1871; and also the further sum of five hundred dollars (\$500) for National purposes, due on the 1st and 2nd quarters 1871, making the Sum total thirteen thousand dollars (\$13,000). The said Sum to be applied to the purposes indicated in the act. By direction of the General Council.

John Chup-co, His (X) Mark; John Jumper, His (X) Mark, Principal Chiefs of the Seminole Nation.

May 12th, 1871.

John F. Brown, National Secretary.

Witness: J. R. Ramsay.

[fol. 62]

EXHIBIT "D"

THE UNITED STATES,

To Seminole Nation,

Dr.

Date		Dollars	Cents
June	For interest on \$500,000 @ 5% per annum, 8th Article, treaty of August 7th, 1856, Annuity due for 1st and 2nd quarters 1871	\$12,500	00
30th	For interest on \$20,000 @ 5% pr annum pr 3rd Article, treaty of March 21st, 1866, for Support of Seminole Government, due for 1st and 2nd quarters 1871	500	00
1871		\$13,000	00

Received at Seminole Agency May, 12th, 1871; of Henry Breiner, Thirteen thousand Dollars, in full of the above account.

Witness

J. R. Ramsay

(Name illegible) (Triplicates.)

John F. Brown, Treasurer

John Chup co his x mark

John Jumper his x mark chiefs

I certify on honor, That the above account is correct and just, and that I have actually this 12th day of May, 1871, paid the amount thereof.

Henry Breiner
U. S. Indian Agent

[fol. 63]

EXHIBIT "E"

Whereas the Government of the Seminole Nation is indebted to the present sum of \$18,694.93 (Eighteen thousand six hundred and ninety-four dollars & 93/cts.) for the erection of Smith Shops and the payment of Smith, and in carrying on the business of the said Government.

Therefore, Be it Resolved by the General Council of the Seminole Nation that in order to defray the expense necessarily incurred in operating this Government, Henry Breiner U. S. Indian Agent is hereby required to pay into the National Treasury of this nation \$13,000 (thirteen thousand dollars) to be applied as the General Council shall direct.

\$12,500 (Twelve thousand five hundred dollars) of said sum of thirteen thousand dollars, being the interest on \$500.00 dollars, by Art. 8th Treaty of August A. D. 1856 for the 1st & 2nd quarters of A. D. 1872. The remaining sum of \$500 (Five hundred dollars) being the interest on \$20,000 by Art. 3d, Treaty March A. D. 1866, also for the 1st & 2nd Quarters of A. D. 1872.

John Chupco, His (X) Mark, John Jumper, His (X) Mark, Principal Chief- Seminole Nation.

John F. Brown, National Secretary.

[fol. 64]

EXHIBIT "F"

THE UNITED STATES,

To Seminole Nation....., Dr.

Date		Dollars	Cents
June	For interest on \$500,000 @ 5% per annum, 8th Article Treaty of August 7th, 1856, annuity due for the 1st and 2nd quarters of 1872.	\$12,500	00
30th,	For interest on \$20,000 @ 5% per annum pr. 3d Article Treaty of March 21st, 1866, for support of Seminole Government, due for 1st and 2nd Quarter 1872.	\$	500 00
1872			
		\$13,000	00

Received at Seminole Agency April 24, 1872, of Henry Breiner, Thirteen Thousand Dollars, in full of the above account.

Witnesses—

E. J. Brown
D. N. Robb,
(Triplicates)

John F. Brown, Treasurer
John Chupco, his Chief
mark
John Jumper, his X mark

I certify on honor, That the above account is correct and just, and that I have actually, this 24th day of April, 1872, paid the amount thereof.

Henry Breiner
U. S. Indian Agt.

[fol. 65]

EXHIBIT "G"

May 13th, 1873.

Resolved by The General Council of the Seminole Nation that Agent Henry Breiner be and is hereby authorized to pay into the Treasury of the Seminole Nation the sum of twelve thousand five hundred dollars pr. 8th Article Treaty of August 7th A. D. 1856, and for the 1st and 2nd quarters of 1873—: Also the sum of five hundred dollars pr. 3rd Article Treaty March 1866.

John Chupco, His (X) Mk., John Jumper, His (X) Mk., Princ-p-l Chief- Seminole Nation.

John F. Brown, Nat. Secretary.

[fol. 66]

EXHIBIT "H"

THE UNITED STATES,

Date	To Seminole Nation,	Dr.	
		Dollars	Cents
June 30, 1873	For interest on \$500,000 @ 5% per annum for 1st and 2nd Quarters 1873, pr 8th Article treaty August 7th 1856, to be paid per capita, or in such manner as the Indians in Council shall determine.	\$12,500	00
1873	For interest on \$20,000 @ 5% per annum for 1st & 2nd Quarters 1873, for Support of Government pr 3rd Article treaty March 21st 1866.	500	
		13,000	00

RECEIVED at Seminole Agency May 16, 1873, of Henry Breiner, Thirteen thousand Dollars, in full of the above account.

(Triplicates.) John F. Brown
Treasurer
Seminole Nation

I CERTIFY ON HONOR, That the above account is correct and just, and that I have actually, this 16th day of May, 1873, paid the amount thereof.

Henry Briener
U. S. Indian Agt.

[fol. 67]

EXHIBIT "L"

Resolved by the General Council of the Seminole Nation, that Henry Breiner U. S. Indian Agent be requested and is hereby fully authorized to pay all National Warrants bearing date 10th May A. D. 1873 to the amount of 970.86
10130.72

(Eleven Thousand one hundred & one & 58/100 Dollars including interest at the rate of 10% pr. annum to the 26th April A. D. 1874 inclusive when and wherever found & presented for payment: Provided the warrant, shall be held by said Agent as vouchers to be delivered into the hands of the proper officer of Seminole Nation together with the residue of the annuity fund accruing to said nation after payment of said warrant—Approved.

John Jumper, His (X) Mark, and John Chupco, His (X) Mark, Principal Chief-, Seminole Nation.

John F. Brown, Clk. Council.

April 28th, 1874.

[fol. 68]

FINDINGS 11 TO 19, INCLUSIVE

The evidence as to these findings consists of a Supplementary Report of the Comptroller General dated September 4, 1936, filed and received in evidence October 7, 1937, which contains, among other things, reports as specified hereinafter, and which reads in part as follows:

[fol. 69] A-31090

September 4, 1936

The Honorable The Attorney General

Sir:

Further reference is made to your letter of September 6, 1935, in which you request to be furnished with a report showing all sums expended under gratuity appropriations by the United States for the benefit of the Seminole Nation of Indians, for use as offsets in suits filed by said Indians

in the Court of Claims, as provided for in the Second Deficiency Appropriation Act, fiscal year 1933, section 2, 49 Stat. 596.

In accordance with your request there is transmitted herewith a report, in duplicate, of disbursements made by the United States for the benefit of the plaintiffs under other than treaty appropriations, during the period from July 1, 1857, to June 30, 1934. There is also incorporated in this report detail of disbursements under appropriations made for the administration of the affairs of the Five Civilized Tribes, referred to on pages 233 to 235 of the report of this office on Seminole Petition No. L-51, forwarded to you on September 29, 1933, together with a complete list of appropriations under which the aforesaid disbursements were made.

Respectfully, (Signed) R. N. Elliott, Acting Comptroller General of the United States

Enclosures: Pages 1 to 208.

[fol. 70] As to findings 11, 12 and 13, it is agreed that the Comptroller General reported that the United States expended under gratuity appropriations for the benefit of the Seminole Nation the respective amounts, during the respective periods of time, and for the respective purposes, specified in the items set forth in each of said findings.

As to findings 14 and 15, it is agreed that the Comptroller General reported that the United States expended under gratuity appropriations for the benefit of the Seminole and Creek Nations jointly the respective amounts, during the respective periods of time, and for the respective purposes, specified in the items set forth in each of said findings.

As to finding 16, it is agreed that the finding correctly states the facts.

As to findings 17 and 18, it is agreed that the Comptroller General reported that the United States expended under gratuity appropriations for the benefit of the Seminole, Creek, Cherokee, Chickasaw, and Choctaw Nations jointly the respective amounts, during the respective periods of time, and for the respective purposes, specified in the items set forth in each of said findings.

It is further agreed that the item "Education—\$2,179,846.86", in finding 18, includes the expenditures set

forth in the following extracts of schedules attached to said report:

[fol. 71]

(Id. p. 30).

Disbursement Schedule No. 9

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Maintenance of Cherokee
Orphan Training School

Total

\$359,978.00¹

(Id. p. 31)

Disbursement Schedule No. 10

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma: Dining Hall and Equipment" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Maintenance of Cherokee
Orphan Training School

Total

\$38,518.86²

¹ The foregoing total was disbursed during the fiscal years 1914 to 1924. The disbursements for each fiscal year shown by the report are omitted.

² The foregoing total was disbursed during the fiscal years 1922 to 1928. The disbursements for each fiscal year shown by the report are omitted.

[fol. 72]

(Id. p. 32)

Disbursement Schedule No. 11

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma: Heating Systems" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Fiscal year	Maintenance of Cherokee Orphan Training School
1918	\$ 172.87
1919	5,462.00
Total	\$5,634.87

(Id. p. 33)

Disbursement Schedule No. 12

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma: Purchase of Land" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Fiscal year	Maintenance of Cherokee Orphan Training School
1917	\$1,500.00
1918	1,800.00
1919	2,403.00
Total	\$5,703.00

[fol. 73]

(Id. p. 34)

Disbursement Schedule No. 13

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma: Repairs and Improvements" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Maintenance of Cherokee
Orphan Training School

Total

\$61,450.95¹

(Id. p. 35)

Disbursement Schedule No. 14

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma: School Building and Assembly Hall"

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Maintenance of Cherokee
Orphan Training School

Fiscal
year

1921

\$7,095.24

1922

17,866.68

1923

40.32

Total

\$25,002.24

¹ The foregoing total was disbursed during the fiscal years 1915 to 1924. The disbursements for each fiscal year shown by the report are omitted.

[fol. 74]

(Id. p. 36)

Disbursement Schedule No. 15

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Cherokee Orphan Training School, Five Civilized Tribes, Oklahoma; Tank and Tower" . . .

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians.

Education:

Fiscal	Maintenance of Cherokee
year	Orphan Training School
1922	\$1,000.00

[fol. 75]

(Id. pp. 50, 51)

Disbursement Schedule No. 19

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Conservation of Health among Indians" . . .

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians

Education:

Maintenance of Cherokee Orphan Training School	2.96
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(Id. pp. 81, 83)

Disbursement Schedule No. 29

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Increase of Compensation, Indian Service" . . .

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians

Education:

Maintenance of Cherokee Orphan Training School 21,297.93

[fol. 76]

(Id. pp. 85, 88)

Disbursement Schedule No. 31

Disbursement made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Indian Boarding Schools" . . .

Total

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians

Education:

Maintenance of Cherokee Orphan Training School

\$1,126,449.76

(Id. pp. 89, 91)

Disbursement Schedule No. 32

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Indian School and Agency Buildings" . . .

Total

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians

Maintenance of Cherokee Orphan Training School 5,541.49

[fol. 77]

(Id. p. 93)

Disbursement Schedule No. 34

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Indian School Transportation" . . .

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians

Education:

Maintenance of Cherokee Orphan Training School

Total \$736.96¹

(Id. p. 94)

Disbursement Schedule No. 35

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriations:

"Indian Schools" . . .

Jointly with the Creek
Cherokee, Chickasaw
and Choctaw Indians

Education:

Fiscal year	Maintenance of Cherokee Orphan Training School
1930	\$1,802.70
1931	10,708.28
1933	875.00
Total	\$13,385.98

¹ The foregoing total was disbursed during the fiscal years 1914 to 1922. The disbursements for each fiscal year shown by the report are omitted.

[fol. 78]

(Id. p. 95)

Disbursement Schedule No. 36

Disbursements made by the United States for the benefit
of the Seminole Nation of Indians under the appropriation:
"Indian Schools: Additional Furniture and Equipment"

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians
Education:

Fiscal year	Maintenance of Cherokee Orphan Training School	
1931		\$295.10

[fol. 79]

(Id. p. 110)

Disbursement Schedule No. 39

Disbursements made by the United States for the benefit
of the Seminole Nation of Indians under the appropriation:
"Indian Schools: Subsistence" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians.
Education:

Fiscal year	Maintenance of Cherokee Orphan Training School	
1929		\$436.85

(Id. p. 111)

Disbursement Schedule No. 40

Disbursements made by the United States for the benefit
of the Seminole Nation of Indians under the appropriation:
"Indian Schools: Subsistence, Summer Months" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians.
Education:

Fiscal year	Maintenance of Cherokee Orphan Training School	
1931		\$598.88
1932		937.64
1933		2,671.66
1934		644.07

Total		\$4,852.25
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[fol. 80]

(Id. pp. 112, 114)

Disbursement Schedule No. 41

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Indian Schools: Support" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians.

Education:

Maintenance of Cherokee Orphan Training School 10.00

(Id. pp. 144, 151)

Disbursement Schedule No. 58

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Purchase and Transportation of Indian Supplies" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians.

Education:

Maintenance of Cherokee Orphan Training School 23,224.52

[fol. 81]

(Id. pp. 152, 154)

Disbursement Schedule No. 59

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

"Relieving Distress, and Prevention, etc., of Diseases among Indians" . . .

Jointly with the Creek, Cherokee,
Chickasaw and Choctaw Indians.

Education:

Maintenance of Cherokee Orphan Training School 4.18

[fol. 82] As to finding 19, it is agreed that the finding correctly states the facts.

Signed this 14th day of July, 1941:

Norman M. Littell, Assistant Attorney General, Attorney for Defendant. Paul M. Niebell, Attorney of Record for Plaintiff.

Raymond T. Nagle, Walter C. Shoup, Attorneys.

[fol. 83] Extract from letter of T. A. Baldwin, United States Indian Agent for the Seminoles to the Commissioner of Indian Affairs, Dated December 6, 1869

"I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation [Seminole], except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation.

"I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making return to the department, upon rolls as if it had been paid per 'capita'.

"I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid unnecessary expenditure of money for Councils, etc. which are of but little benefit to the nation (for example the last council held cost the nation \$700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

Extract from Report of Henry Breiner, U. S. Agent for the Seminoles, Dated January 25, 1871

"Estimated cost of Agency residence at the Seminole Agency and furnishing the same with good substantial furniture; and of improving part of the Government Reserva-

tion, Stocking the same and furnishing machinery for all the necessary purposes of Agriculture:

1 Agency Building for residence	7,000.00
1 Meat & Wash house with Water closet & wood house combined	500.00
1 Stable, carriage house & sheds, combined	1,000.00
Fencing yard & well with pump	200.00
Furniture for Agency Residence	1,500.00

Total for Agency Buildings \$10,200.00"

Extract from Letter of Acting Commissioner of Indian Affairs, H. A. Clum, to Henry Breiner, U. S. Agent for the Seminoles, Dated January 5, 1872.

"In reply to your letter of the 20 Dec. last, and to the request of the Seminole Chiefs that their National funds be hereafter paid to the Treasurer of the Nation instead of per capita, I have to say that it is not deemed advisable to change the manner in which payment of annuities to these Indians has heretofore been made until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs."

Extract from Letter of the Secretary of the Interior to the Acting Commissioner of Indian Affairs, Dated December 10, 1873

"I hereby acknowledge the receipt of your letter dated Aug. 7th, 1873, enclosing a copy of a letter from Agent Henry Breiner in which he transmits an 'Act of the Seminole General Council dated July 23rd, 1873' to the effect that the U. S. Agent for the Seminoles from and after the date of said act shall be required to pay into the Treasury of said Nation each and every installment of annuity due said Nation as interest accruing on the sum of Five hundred thousand dollars.

[fol. 84] "In reply I have to say that it is the opinion of this Department that the 8th Article of the Treaty of Aug. 7th, 1856, (Stat. Vol. 11, p. 702) which stipulates that the payment of said annuities shall be made to said Indians per capita settles the question and the payments must therefore be made in accordance with said treaty stipulations."

Extract from Report of John P. C. Shanks, Special Commissioner, to the Commissioner of Indian Affairs, Dated August 9, 1875

"These claims are enormous in amount, and show too clearly that the Seminoles are in bad hands. These parties who had these claims (except Harjo, who is an assignee) are or have been officials in the Nation. Robert Johnson is a negro, and is interpreter to the chief; Chupco is present chief; John Jumper was former chief; James Factor, a half breed, is treasurer; E. J. Brown is a white man, formerly U. S. Indian Agent of the Seminole Nation, since has had the address to procure his admission as a member of the tribe.

"These men have evidently stood together in the wrong, of procuring such allowances, and did stand together in refusing to relinquish the claims, or a part of them, except a deduction for present payment upon claims which did not bear interest.

"James Factor, the treasurer, issues the warrants and pays them. There is no proper record kept.

"The truth is, that though they have a council, John Jumper, James Factor, John Chupco, E. J. Brown and Robert Johnson, together, and they work together, are in fact the Government of the Seminoles.

"They procure a resolution of the council generally, endorsing their claims, but these men control the council, the act being really theirs, but nominally the council.

"There was not an officer in connection with the Executive Department of the Seminole Nation, who could write his own name, at the date of this payment."

Telegram Commissioner of Indian Affairs to A. B. Meacham, Dated November 8, 1878

"Telegram of yesterday received. I hold to the right of every individual Indian to receive his annuity money into his own hands. No creditor can be permitted to gobble his money, directly or indirectly. Therefore if you cannot find the proper man, don't pay anybody else."

Extract from Letter of A. B. Meacham, Special Agent, to the Commissioner of Indian Affairs, Dated November 20, 1878

"Some of the Band Chiefs are tyrants and despots, holding their people under abject fear and in some instances of actual servitude.

"While these Chiefs were blocking the way the people were encamped half starving and suffering from the weather.

"The Chiefs raising every point possible to produce delay, thinking that I would yield and pay the money over to the Band Chiefs. Your answer came Sunday. It was just the thing. Pointed, positive, square, complete. I almost feared you would abate, but thanks for your firmness. The telegram was a thunder clap. It settled the question for once and for all, that the Chiefs should not, by Government [U. S.] authority, 'gobble' the money rightfully belonging to the poor subjects of 'Kings and warriors.'

"The Chiefs intend to 'gobble' the next money for the purpose of keeping up their government. . . . I submit that it is a great shame for the old grey headed Indians and Freedmen to be compelled to attend payment, only to receive the pittance, hold it in their hands for ten seconds to ten minutes, and then giving up one fifth to the Chiefs, and the other four fifths to the traders.

"Perhaps you can prevent this crime being repeated. I trust you can. This little 'annuity' is a curse to the Seminoles. It debases everybody, and ought to be put in shape so that no Chief, or attorney, or Trader, could take advantage of children and decrepit old men and women. The trouble arises out of the ambitions of the Chiefs to control their own affairs, as the other Civilized Tribes of the Territory are doing. The truth is, the Seminoles are behind the Cherokees and Creeks—The Choctaws and Chickasaws I have not met—in civilization.

"As I view this Seminole question it is simply an effort on the part of the Chiefs to hold on to old usages because

they are lords over subjects who have not the courage to resist wrong. It is a perfect system of Bull-dozing the ignorant in order to live upon them.

... As I learn from Seminoles and white men the 'January payment' has always been gobbled up by the Chiefs. The people all come and receive their money but give it all up to the Chiefs at the door not even withholding the small change. I know that you do not approve of this robbery. To make the effort to prevent it, and fail would be bad. To permit the Chiefs to rob their people before the very eyes of an officer is all wrong."

Extract from Letter of A. W. Crain to Hon. Dennis Flynn,
N. C., Dated May 18, 1902

"I am delegated by a committee of Seminole Indians to obtain some information from you, if from your manifold duties you can give it your attention. This is it. A few years ago through your efforts a Bill was passed by Congress making the Seminole annuity payable to the U. S. Indian Agent. This gave great satisfaction to all the tribe except the official class who through the representation of the Governor that their salaries would cease to be paid, opposed it by a petition of his get up. Then for some reason to us unknown this law was set aside and the annuity has since been paid through his manipulation and entirely to his wish. Your constituents, the merchants of the adjoining country towns in Oklahoma selling better and cheaper goods would like it paid as are all other Indian annuities so they might get trade and the tribe would with the exceptions stated so prefer it. They, the tribe, of course would like same say in the disposition of the funds. Can you give us any information on the subject and have we any recourse to have the law executed?"

Extract from the Recommendations of P. L. Soper, Special Assistant United States Attorney, In Re: Administrator's Report on Estate of Loyal Seminoles

"That the sums of money as therein stated to have been paid out have not been paid to the persons therein named.

"Each report (which was prepared by the Attorney for the Seminole Nation, appearing as the personal attorney of [fol. 86] Mr. A. J. Brown, administrator, who at the same time was treasurer of the Seminole Nation, vice president of the only creditor, the Wewoka Trading Company, and who acted as attorney in fact and agent for Samuel J. Crawford in collecting an unauthorized and illegal fee of twenty per cent of the total amount,) purports to show that the amount due such heir was paid in cash while the testimony and the exhibits introduced in said cases will show at least ninety per cent of the total amount of moneys received by the administrator from Special Agent James E. Jenkins not to have been paid by said administrator in cash.

.

"The testimony shows that immediately after the passage of the act appropriating one hundred and eighty-six thousand dollars the Wewoka Trading Company, of which the administrator is a partner, extended credit to persons whom they thought were entitled to receive a portion of said money; to the extent of sixty per cent of the amount due each, reserving twenty per cent from the claim of each heir to pay Samuel J. Crawford.

"In the two accounts presented against deceased original claimants, no itemized statement, verified by oath, was ever presented to the administrator for allowance by the Wewoka Trading Co.

"The testimony shows that books were issued and given to each claimant, containing a certain credit, upon which interest was charged from the beginning. Thus no record was ever kept of the nature, character and kind of goods, wares and merchandise each person obtained and the price paid for same. With adults this might not matter, but with minors it is of the utmost importance, especially taking into consideration the state of intelligence of the claimants, and especially the majority of those who testified before your Honor."

Extract of the Report of Henry C. Lewis, Investigator of the Department of Justice, Set Forth in the Letter of Acting Commissioner of Indian Affairs to the Secretary of the Interior, Dated November 11, 1905

"It may not be inappropriate to make one or two observations upon this system of credit. The discount of ten per

cent was taken, according to the administrator's statement, upon the understanding that if the appropriation were paid by the 1st of June following, the discount would be refunded. As a matter of fact, the payment was not made until after the 1st of the following June, so that the company got the benefit of the discount. To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to turn in the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

[fol. 87] Extract from Report of Wm. L. Bowie, Special Investigator for the Interior Department to Supt. for the Five Civilized Tribes, Dated June 15, 1916

"The Wewoka Realty & Trust Co., is a corporation organized under the laws of the State of Oklahoma with a

capital stock of \$100,000.00, which is divided into 4,000 shares of the par value of \$25.00 each. Mr. A. J. Brown of Wewoka advised me that he owned $\frac{3}{8}$ of the stock; that his brother John F. Brown owned $\frac{3}{8}$ and that C. L. Long owned the remainder. A. J. Brown, who is commonly known as Jackson Brown, is president and C. L. Long is secretary and treasurer. John F. Brown is Governor of the Seminole Nation, and A. Jackson Brown is a brother.

“The Wewoka Trading Co., which is owned by the same persons who control the Wewoka Realty & Trust Co., occupies the store buildings in Wewoka which are located on the lots covered by the first and second mortgages given by the Wewoka Realty & Trust Co. to John Smith and Lizzie Yahola. One of the buildings is a well constructed two story brick building, built in 1903, at a cost of approximately \$28,000.00. I estimated it to be about 90 x 90. It is principally valuable for the business uses of the Wewoka Trading Co.

“Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs, that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand. As governor, he issued the tribal scrip, and, as Indian trader, he held this scrip, requiring the Indians to whom it was issued to endorse it over to him, in payment of merchandise accounts, or for goods to be purchased by them. In this way the Browns monopolized the Indian trade, and, it is stated, that if it had not been for poor business judgment used by them in speculation and in bad business ventures, that they would be in splendid financial condition. . . . In recent years, they have been losing the Indian trade, and reliable persons have advised me that Governor Brown has been gradually losing the confidence of the members of his tribe.

“ . . . In my opinion, Governor Brown has shown in his transactions with John Smith and Lizzie Yahola, that

he has little regard for the welfare and protection of the Indians in general, and it is unfortunate that he occupies a position which enables him by reason of the confidence placed in him as such official to impose upon them."

Extract from Letter of E. B. Meritt, Assistant Commissioner of Indian Affairs to the Commissioner of Indian Affairs, Dated July 20, 1916

"Enclosed herewith is a letter from Superintendent Parker based on a report of Special Investigator Bowie concerning Chief John F. Brown and Secretary A. W. Crain of the Seminole Nation in Oklahoma. Attached therewith are memoranda giving the opinions of Mr. Howell and Mr. Dortch, who recommend that the only way to prevent Brown and Crain from continuing to use their official positions to advance their personal interests at the expense of the Indians under their authority is to abolish the tribal government of the Seminole Nation, particularly so since there is so little tribal property remaining and so little need for tribal officers. I concur in their recommendation."

Memorandum of J. H. Dortch, Dated July 20, 1916

"This is the rawest graft deal I have ever come in contact with, but how are we to help ourselves. Held out to the world as the guardian of the Indian we are powerless to protect; it seems, under the law. I believe that if we cannot help this poor Indian we ought to get out of the game. It seems to me that we should at once close up the tribal government and shear the Government of all authority outside the duty of signing the very few deeds now pending, etc. Unless we can intervene as the Indians' 'best friend' in the court's attempt the disgorging process, we should absolutely quit. I agree with Mr. Howell that it will not be wise to remove the tribal authority on charges. The other plan is the best method of dealing with these tiger shore sharks."

[fol. 88] Memorandum of J. W. Howell, Office of Indian Affairs, Dated July 18, 1916

"Report of Supt. Parker of June 28, 1916, shows that two officers of the Seminole Nation, to-wit: John F. Brown, Governor, and A. W. Crain, Tribal Secretary, are engaged in unconscionable transactions with a full-blood Creek woman named Lizzie Yahola.

"The latter is in receipt of a large income resulting from royalties due on oil production taken from her inherited land.

"Crain has a 20% contract for managing her estate, and Brown, with Crain's aid, has obtained loans from the woman aggregating about \$60,000.00 on real estate of, approximately half that value, on foreclosure.

"I do not think it would be advisable to try to remove these officers upon formal charges, but I do think that, as there is no longer any need of Seminole Tribal officers, we should discontinue the Tribal government, following the action which we took as to the Cherokees."

Extract from Letter of Cato Sells, Commissioner of Indian Affairs to John F. Brown, Principal Chief, Seminole Nation, Dated September 22, 1916

"As a preliminary step to the taking of similar action in the Seminole Nation, I have to request that you will tender your resignation immediately as Principal Chief thereof, subject to acceptance by the Secretary of the Interior at such time as he may see fit."

Extract from the Original Report of the General Accounting Office

"In connection with the aforesaid disbursements made to the Treasurer of the Seminole Nation of Indians, attention is invited to the act of April 15, 1874, 18 Stat. 29 * * *

"In accordance with the provisions of the foregoing act, the Seminole Nation of Indians, by an act of the Seminole General Council, approved April 2, 1879, consented to the payment of the annuities then due, or thereafter to become due, under Article 8 of the aforesaid Treaty of August 7, 1856, into the Treasury of the Seminole Nation, provided, however, that the sum of \$5,000 thereof should be appropriated annually by the Seminole General Council to the school fund of said nation. (See Indian Office Files, Union C-315-1879, and Union I-354-1879.)

"With reference to note (x) of the aforesaid balanced statement, attention is invited to the fact that the amounts set out therein are made up of moneys due the United States on account of advances not accounted for and items of disbursements which were suspended and never allowed. * * * The amount of \$26,022.49 is made up of suspended items and includes \$25,000 of the interest appropriated pursuant to Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, prior to 1874, which, instead of being paid per capita, as stipulated

in said article, was paid to the Seminole Treasurer, and therefore was disallowed.

“With reference to note (z) of the aforesaid balanced statement, attention is invited to the fact that the amounts set out therein are made up of moneys due the United States on account of advances not accounted for and items of disbursements which were suspended and never allowed. . . .

The amount of \$20,595.41 includes \$12,500 of the interest appropriated pursuant to Article 8 of the aforesaid Treaty of August 7, 1856, prior to 1874, which, instead of being paid per capita, as stipulated in said article, was paid to the Seminole Treasurer, and therefore was disallowed. The amount of \$32,475.65 was shown in the fiscal officer's account as a per capita payment to the Seminole Indians, but was suspended by the auditor on account of the lack of a certificate of an interpreter and one witness. Said amount of \$32,475.65 includes \$12,500 of the interest appropriated pursuant to Article 8 of the said Treaty of August 7, 1856,”

“By the act of March 3, 1893, 27 Stat. 645, the President of the United States was authorized to appoint, by and with the advice and consent of the Senate, three commissioners to negotiate with the Seminole, Cherokee, Chickasaw, Choctaw, and Creek Nations of Indians for the extinguishment of the tribal title to the lands held by any and all of said Nations. . . .

“Pursuant to the aforesaid act, commissioners were appointed, who entered into separate agreements with the aforesaid nations of Indians, including the Seminole Nation. Said agreements provided generally that the United States should bear the expense of the administration or division of the tribal estates, which involved the allotment of lands in severalty; the survey, appraisement, and sale of certain lands; the survey and sale of town sites; and the leasing of certain mineral and oil lands. In carrying out said projects, there were also considerable expenses incurred by the United States in the removal of objectionable persons from allotments; the removal of restrictions upon the alienation of lands of certain allottees; the investigation of leases fraudulently obtained, and other expenses, including the pay of commissioners, superintendents, inspectors, attorneys, and miscellaneous employees.”

Extract from Supplemental Report of the General Accounting Office,
Dated September 4, 1936

[fol. 90]

"Commission, Five Civilized Tribes"

Jointly with the Creek, Cherokee, Chickasaw and Choctaw Indians	Fiscal Year		
	1894	1895	1896
General Office expenses:			
Traveling expenses.....	\$579.64	\$768.51	\$476.98
Incidental expenses.....	1,334.62	1,703.13	1,639.69
Pay of commissioners.....	9,284.40	14,678.09	24,175.80
Pay of miscellaneous employees.....	1,761.95	1,795.55	
Pay of secretary.....	1,027.78	1,783.95	1,637.25
Total.....	\$13,988.39	\$20,729.23	\$27,929.72
	1897	1898	1899
General Office expenses:			
Traveling expenses.....	1,501.84	3,679.41	5,486.74
Incidental expenses.....	2,797.71	6,487.54	7,079.98
Pay of commissioners.....	27,487.71	25,000.00	20,000.00
Pay of miscellaneous employees.....	699.00	1,446.48	5,030.18
Pay of secretary.....	1,673.33	1,709.24	1,856.55
Pay of interpreters.....			217.34
Livestock.....			330.00
Provisions.....			15.25
Feed and care of horses.....			406.74
Total.....	34,159.59	38,412.67	40,483.53

"Indian Schools, Five Civilized Tribes"

Education:	Fiscal Year	Aid of common schools
	1911.....	289.11
	1913.....	8,412.83
	1914.....	6,749.57
	1915.....	6,611.10
	1916.....	3,759.11
	1917.....	4,738.70
	1918.....	5,258.62
	1919.....	3,715.66
	1920.....	4,005.90
	1921.....	3,550.39
	1922.....	2,300.84
	1923.....	816.48
	1924.....	581.92
	1925.....	512.34
	1927.....	689.98
	1928.....	780.10
	1929.....	1,559.86
	1930.....	3,214.40
	1931.....	5,804.37
	1932.....	9,930.50
	1933.....	11,411.86
	1934.....	11,065.20
Total.....		\$95,758.84

[fol. 91]

Memorandum of P. S. Garber, Chief Education Division,
Office of Indian Affairs to Mr. Dawson, Land Division,
Dated September 18, 1917

"During the fiscal year 1917 there was expended approximately \$24,000.00 from 'Interest on Seminole School Fund' in support of the Mckusukey Academy.

"This school had a total enrollment of one hundred and forty-one pupils, with three teachers and thirteen other employees.

"While the Superintendent reports that public school privileges are within reach of almost every pupil in the school, the enrollment is largely made up of full-bloods, a large percentage of whom are orphans.

"This school is co-educational.

"It is believed that the Mekusukey Academy will fill a useful place for several years to come."

Reports of Enrollment by Nations or Tribes in the Cherokee Orphan Training School, Talequah, Oklahoma, from 1912-1934, inclusive, show no Seminole Indians in attendance therein.

Extract from Letter of John Chupeco, Chief of the Seminole Nation, and Fus Hachee, Second Chief, to the Commissioner of Indian Affairs, Dated March 12, 1872.

"... When the Treaty of 1866 was made we were promised that our country would be surveyed that fall. We arrived here during the fall and winter of 1866. No survey having been made our Agent instructed us where to locate and we did as directed. Superintendent Byers visited us during February of 1867 told us that we were now at our home and to make all the improvement we could. Col. Wortham the next incumbent visited us in Dec. 1867 and while here gave us every assurance we could ask that we would be by the Department of Ind. Affs protected in whatever improvement we would make. In the Spring of 1868 a survey of this country was made and we were shown our boundary lines and the majority of the Seminoles who had located outside of our boundaries left their places and moved within our lines taking and improving the places where they now live. Our friends the Creeks former owners of this country complained of the survey saying it was unjust and incorrect as it threw the dividing line of the Creek Nation too far East. As this complaint if true was of

momentous interest to us we asked Superintendent L. M. Robinson who next visited us. He told us that the survey was made probably right and for us to go on and make all the advancement we could. That in any event we would not be interfered with. That we could consider this our own home and that we would not be moved from here. We are informed by our delegates who attended and represented us at the General Council of Dec. 1870 that Col. E. S. Parker then Com. Ind. Affairs told them that no survey of this country had as yet been approved by the Department and to tell the Seminoles not to be in any way alarmed for in the event of the first survey being wrong the Seminoles should not be interfered with, that if this country should prove to belong [fol. 92] to the Creeks they would be given other unoccupied land instead thereof, and said the Creeks have already agreed to this. We have made such improvements as we could expending all that the Government has given us as well as what we may have had of our own for we have been assured by everyone that we have asked authorized as we thought to speak for the Government, of substantially the same thing, viz, that we should not be interfered with, and we have diligently sought information from every source. Our farms that we have made would not compare favorably with those of white men in the states we know still they are very important to us. As we gain our food and shelter from them and common as they may be they are all important to us. Many of our people are old and infirm unable if deprived of their present to make new homes. The Seminoles during the years of their civilization have been continually moved about from place until we are heartily tired of moving, and if moved from here after the repeated assurances we have had of security and protection we fear many would become discouraged and lo-the to begin anew. We are informed by the Creeks that according to the new survey by virtue of late written documents from the Department they are now in possession of their entire country of which this is a part and that we the Seminoles can only remain here by becoming subject to their laws a condition of things we are in no wise willing to agree to. We respectfully call your attention to an enclosed letter marked "A" which we received from No cas yarholor who is Judge of the nearest adjacent District of the Creek Nation. We have answered this letter or the latter part of it by informing him that we did not locate here in this part of the country of our own

accord but in compliance with instructions from our Agent and that until we should receive direct information from the proper authority of the U. S. we would continue to enforce our own laws over this country. We would respectfully ask an answer to this so that we may know what we are doing."

[fol. 93] ORDER SETTLING THE RECORD—July 18, 1941

The plaintiff having filed a petition for writ of certiorari to the Supreme Court in the above styled case, and having requested that those certain portions of the evidence which are attached hereto be included in the record to be certified to the Supreme Court, and the parties having agreed and the court having found that they are an accurate transcript of the portions of the original record material to the errors assigned, the same are this 18th day of July, 1941, hereby settled and approved as the portions of the evidence to be included in the record to be certified to the Supreme Court.

By the Court: Richard S. Whaley, Chief Justice.

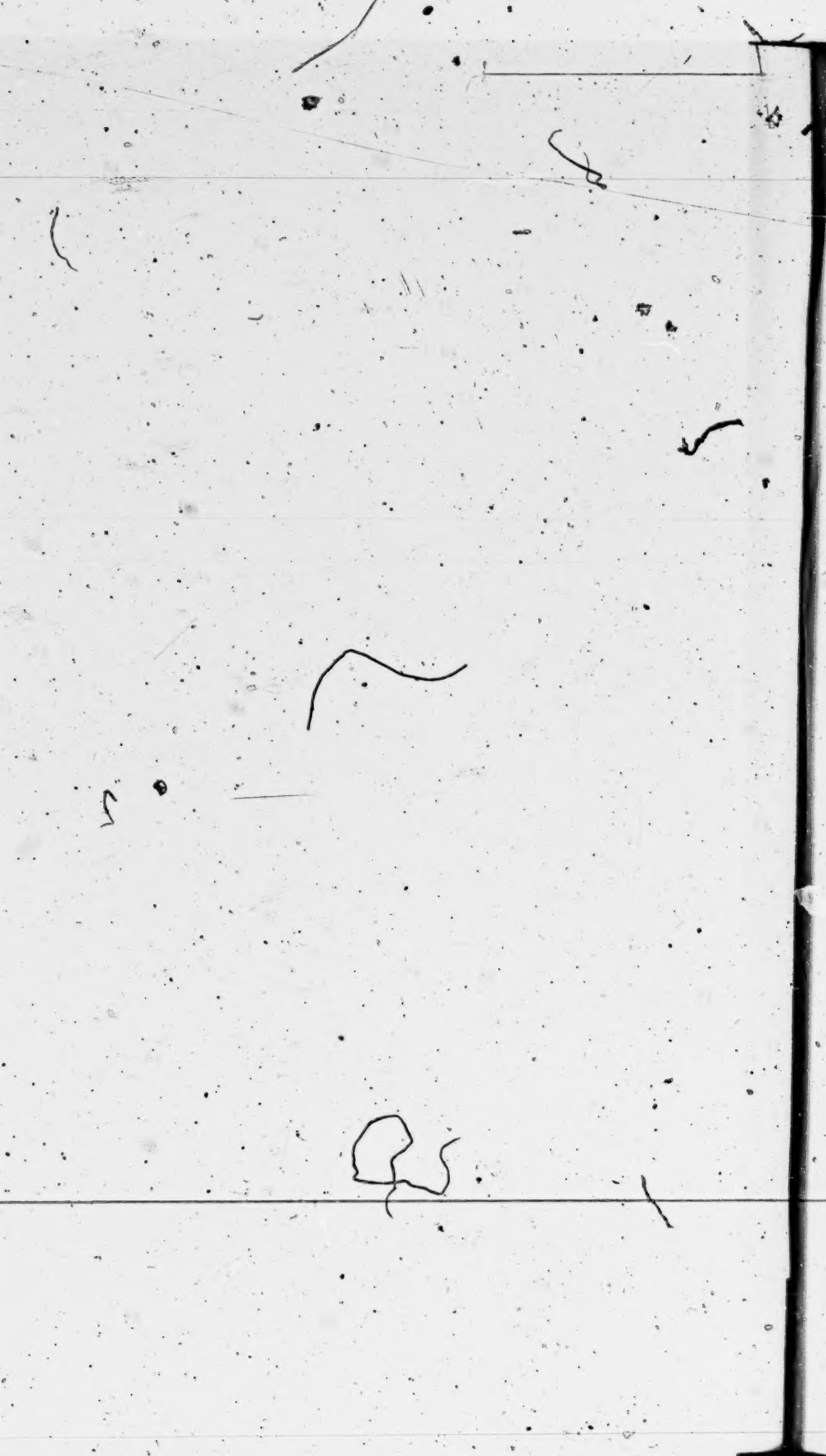
[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 13, 1941

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration and decision of this application.



FILE COPY

Office - Supreme Court, U. S.

FILED

AUG 5 1941

CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION,

Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.

PAUL M. NEIBELL,

W. W. PRYOR,

Counsel for Petitioner.

C. MAURICE WEIDEMEYER,

Of Counsel.

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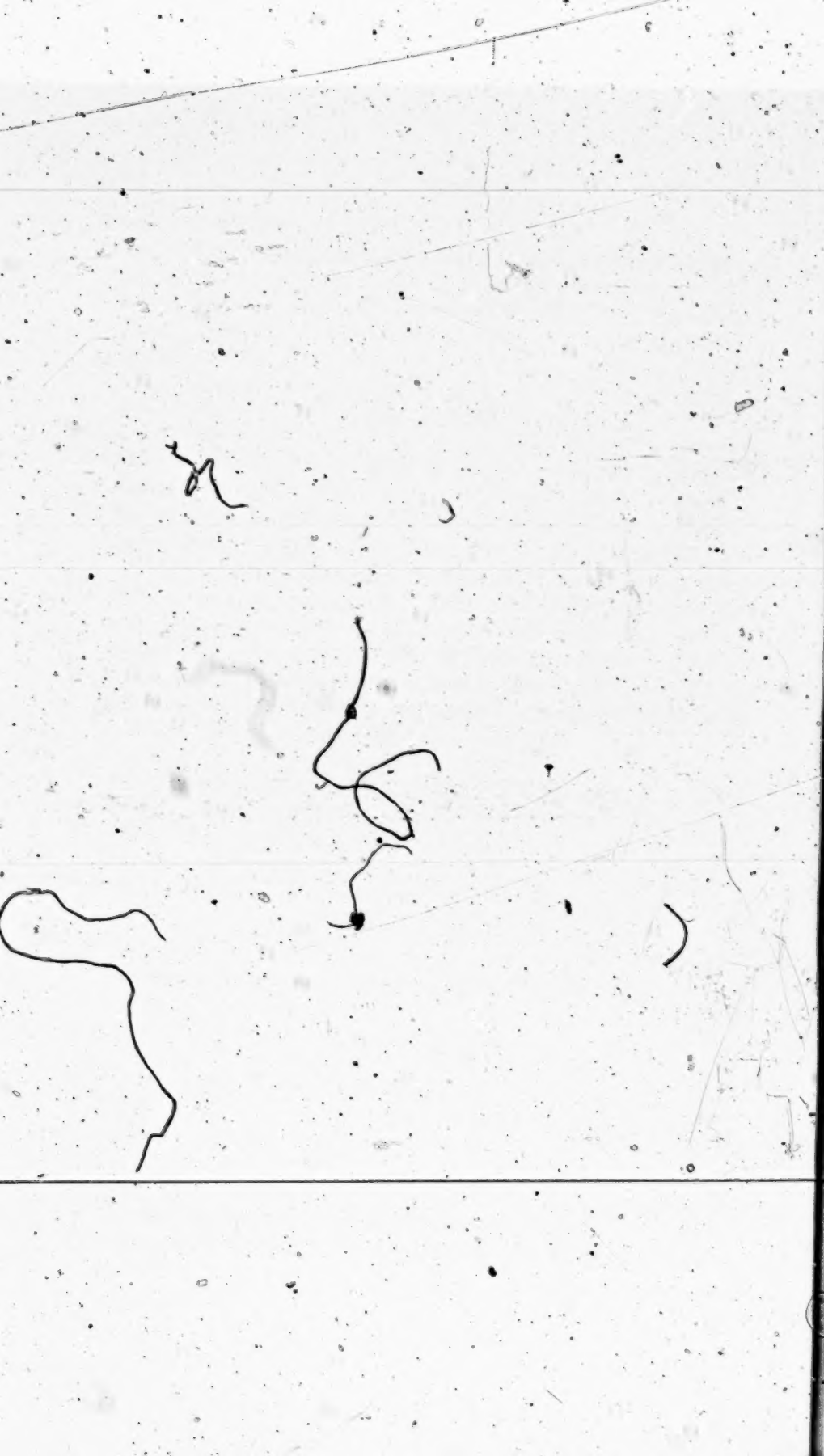
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION,

vs.

Petitioner,

THE UNITED STATES.

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

The Seminole Nation of Indians prays that a writ of certiorari issue to review the judgment of the Court of Claims entered in the above entitled cause on January 6, 1941 (R. 8-39).

Opinions Below.

The opinions of the Court of Claims are not as yet reported (R. 8-39, 39-42).

Jurisdiction.

The judgment of the Court of Claims was entered on January 6, 1941 (R. 39). Motion for a new trial filed in the proceedings was allowed as to certain items of the

claim and overruled as to other items on May 5, 1941 (R. 39-43). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 229, 43 Stat. 936, 939 (Sec. 288 of the Jud. Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

"Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation."

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides as follows:

"That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act . . . plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended

petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed; or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of sub-

stantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

In order to avoid repetition the provisions of the treaties and statutes involved in the several items of the claim will be set forth in the discussion of said items.

Questions Presented.

The questions presented are as follows:

1. Whether an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress, by subsequent legislation, provides that payments be otherwise made; and whether the United States is liable to the tribe for the balance of any moneys not so disbursed and expended.

2. Whether the Secretary of the Interior has plenary power over the funds of an Indian tribe, and can disburse tribal funds without the authority of Congress, and in contravention of the express prohibition by Congress against such disbursement.

3. Whether Congress by Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502) prohibited payments of tribal moneys to the tribal officers of the Five Civilized Tribes; and if so, whether the Secretary of the Interior was required to comply with this provision of law.

4. Whether the United States has the burden of proving affirmatively its gratuity offsets under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

5. Whether amounts disbursed by the United States as administrative expenses and incidental to the fulfillment

of its treaty and agreement obligations to petitioner are gratuity offsets under said Act of August 12, 1935.

Statement.

The Act of May 20, 1924, *supra*, as amended, conferred upon the Court of Claims jurisdiction to adjudicate the legal and equitable claims of the Seminole Nation against the United States growing out of treaties, agreements and acts of Congress relating to Indian Affairs.

On February 24, 1930, the Seminole Nation filed suit under the above act. The trial of the case was delayed some four years for a general accounting of Seminole funds requested by the Government, and this accounting report was filed by the United States in the record of the Court below. On September 19, 1934, the Seminole Nation amended its petition to conform to the facts set forth in said accounting report, and the case was submitted to the Court of Claims on June 4, 1935. On December 2, 1935, the Court rendered a decision on the claims presented in the amended petition awarding judgment for \$1,317,087.27 in favor of the Seminole Nation (82 C. Cls. 135).

Upon a review of the above decision, this Court held that the amended petition embodied new claims raised for the first time therein, and, said petition having been filed after the expiration of the limitation for filing suits as fixed in the jurisdictional act, the Court of Claims had no jurisdiction to render the above judgment (*United States v. Seminole Nation*, 299 U. S. 417).

The case was reinstated under authority of the Act of August 16, 1937, c. 651, 50 Stat. 650, and a second amended petition was filed on November 8, 1937, limiting the claims therein presented to those found to be meritorious by the lower court in its decision of December 2, 1935. In this second proceeding, after trial upon the merits, the Court of Claims, on January 6, 1941, rendered a decision dismissing

the petition and overruling in many respects its original decision of December 2, 1935. On motion for a new trial, several of the errors of this last decision were corrected by the lower court, and overruled as to others.

As the case now stands there are conflicting views expressed by the lower court upon the same issues, and we are requesting this Court to review the case and clear up the existing confusion.

The claim herein presented is one of accounting, and consists of items falling generally within two classes:

1. Items as to which the United States failed to make payments in the amounts and in the manner provided by its treaties and agreements with the Seminole Nation, and

2. An item as to which payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law, and in contravention of positive directions of Congress forbidding such disbursements.

Items 1 to 4 (class 1) arise and grow out of the treaties of August 7, 1856 (11 Stat. 699) and March 21, 1866 (14 Stat. 755), between the United States and the Seminole Nation of Indians, and numerous acts of Congress which will be referred to and quoted in connection with the particular items of the claim to which they apply.

Item 5 (class 2) arises and grows out of Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495), and involves the construction of said provision of law.

The Act of July 26, 1866, c. 266, 14 Stat. 255, 280, provides in part as follows:

"No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

This provision of law (which became Section 2097 of the Revised Statutes of the United States) applies generally to the claim herein presented.

The particular items of the claim will be outlined briefly below.

Item 1.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States disburse annually for ten years \$3,000 for the support of schools; \$2,000 for agricultural aid, and \$2,200 for the support of smiths and smith shops, a total obligation of \$72,000. Congress annually appropriated the amounts to fulfill this treaty obligation during the fiscal years 1857 to 1866, inclusive. However, \$10,436.58 only was so disbursed by the officers of the United States, and the balance of \$61,563.42 is claimed for the Seminole Nation (R. 11-12).

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, 702, provided for the establishment of a Seminole trust fund of \$500,000, and the annual interest thereon of \$25,000 was directed to be disbursed annually per capita to the members of the Seminole Nation. Although Congress annually appropriated the amounts to fulfill this treaty obligation from the fiscal years 1867 to 1909, inclusive, yet the officers of the United States failed either to disburse or apply to this treaty object a total of \$154,551.28, due for the fiscal years 1867-1874, 1876, 1879, and 1907-1909 (R. 12-13).

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States establish a permanent school fund of \$50,000 for the Seminole Nation, and the annual interest of \$2,500 on same was directed to be "paid

annually to the support of schools." Although Congress annually appropriated said interest for the fiscal years 1867 to 1909, inclusive, yet a total of \$61,347.20 of said interest was not disbursed in accordance with the requirements of said treaty provision (R. 13-14).

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States erect suitable agency buildings on the Seminole reservation "at an expense not exceeding ten thousand (\$10,000) dollars." Congress twice appropriated said \$10,000 by the Acts of July 28, 1866, c. 296, 14 Stat. 310, 319, and May 18, 1872, c. 172, 17 Stat. 122, 132, but neither of said amounts nor any part thereof, was disbursed for said treaty purpose, though \$9,030.15 of the last appropriation was disbursed for some unknown purpose. However, \$931.76 was disbursed from general appropriations for agency buildings and repairs within the Seminole Nation, for which the United States has been credited. A balance of \$9,068.24 is claimed under this treaty obligation (R. 14-15).

Item 5.

Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502, provided as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

A review of the history of this legislation shows that by the Act of April 15, 1874, c. 97, 18 Stat. 29 (which applied to Treaty of August 7, 1856, funds only), and the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, the Seminole tribal officers were entrusted with the disbursement of certain of the Seminole tribal income. The reports of the Dawes Commission for the years 1894 to 1898 state that the tribal governments of the Five Civilized Tribes were grossly corrupt; that the affairs of these tribes had fallen into the hands of a few energetic mixed-blood Indians and white men who were using the tribal funds to further their own personal interests, and were amassing large fortunes by robbing the other and more ignorant members of the tribe of their share of the tribal estate. Such activities of the Seminole tribal officials had been reported to the executive officers of the United States as early as 1869 (R. 60).

To put a stop to the dissipation of the tribal income of these tribes by the tribal officers, Congress, under the Curtis Act, assumed full administrative control over the property and affairs of the Five Civilized Tribes, directed the allotment of the tribal lands, and the equal division of the funds of said tribes among the members thereof. As a part of this broad comprehensive scheme, said Section 19 forbade the payment of the tribal funds thereafter to the tribal officers on any account whatever for disbursement.

In utter disregard of this express prohibition of Congress, the Secretary of the Interior, during the fiscal years 1899 to 1907, inclusive, continued to pay over to the Seminole tribal officers the Seminole tribal moneys, and thus permitted the robbery of a helpless people to continue until it was stopped finally by an opinion of the Attorney General (26 Op. Attys' Gen. 340). The petitioner claims the sum of \$864,702.58 which was disbursed in direct contravention of this positive provision of law (R. 15).

Specification of Errors to be Urged.

As to the affirmative items of petitioner's claim, the lower court erred in holding as its conclusions of law:

1. That an Indian tribe is not entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, and that the United States is not liable to the tribe for the balance not so disbursed or expended.

As to Item 1 particularly—that the United States was authorized by the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, to divert for the relief of refugee Indians the amount of \$61,663.42 of the total required to be disbursed by the United States for schools, agricultural assistance, and smiths and smith shops under Article 8 of the Treaty of August 7, 1856; and that the release in Article 8 of the Treaty of March 21, 1866, affects the right of the Seminole Nation to recover for this unfulfilled treaty obligation.

As to Item 2 particularly—in finding, contrary to the evidence adduced, that the following amounts appropriated to fulfill Article 8 of the Treaty of August 7, 1856—requiring said moneys appropriated to be disbursed per capita to members of said tribe—were disbursed by the United States for the benefit of the Seminole Nation:

1870	\$17,821.00
1871	12,500.00
1872	12,500.09
1873	12,500.00
1874	11,101.64

As to Item 3 particularly—that the United States could disregard the provisions of Article 3 of the Treaty of March 21, 1866, requiring the United States to disburse \$2,500 annually for the support of schools within the Seminole Nation, and also in violation of said Section 2097 of the Revised

Statutes of the United States, and thus avoid its responsibility by disbursing moneys other than in accordance with the said provisions of law.

As to Item 4 particularly—that the United States substantially complied with Article 6 of the Treaty of March 21, 1866, requiring it to construct suitable agency buildings on the Seminole reservation at an expense not exceeding \$10,000, by a disbursement of \$931.76 only for such purpose, after dissipating most of the \$10,000 appropriated by Congress to fulfill this treaty obligation and disbursing it for a purpose not shown.

2. Further, the lower court erred in holding that Section 19 of the Curtis Act does not contain a broad and comprehensive prohibition against the payment of any tribal moneys on any account whatever to the tribal officers for disbursement, but that the meaning of said provision is limited to a prohibition against the payment of tribal moneys to the tribal officers for per capita payments only.

As to the counterclaims allowed, the lower court erred in holding and finding:

1. That the United States need not prove affirmatively that the items claimed as gratuity offsets under said Act of August 12, 1935, were disbursed gratuitously and for the benefit of the Seminole Nation before it is entitled to such offsets.

2. That the amounts disbursed by the United States for administrative expenses and as incidental to the performance of its treaty and agreement obligations with the Seminole Nation are gratuity offsets, rather than holding that said expense is to be borne by the United States as necessarily incidental to the performance of its treaty and agreement obligations with petitioner.

3. That the United States is entitled to a gratuity offset for \$165,847.17 disbursed by it in purchasing lands of the

Creek Nation for the Seminoles, upon which lands the Seminoles had been erroneously located by the United States and encouraged to make valuable improvements in reliance upon the promise of the United States that if the first survey of the boundaries be found to be in error the United States would protect them in their improvements.

4. That the petitioner is chargeable with any part of the items of Education, Sale of town lots, Sale of town sites, Probate expenses, General Office Expense, Surveying Segregated Coal and Asphalt Lands, and other like items of gratuity offset, without substantial evidence in the record to support such a charge against the petitioner.

5. That petitioner is chargeable with 3.72 per centum of items totaling \$11,416,066.55 (Finding 18, R. 19-20) obtained by the use of population figures of the Five Civilized Tribes from 1866 to 1934, rather than a percentage of 3.08 based upon population figures shown by the final rolls of petitioner and the other Five Civilized Tribes made by the Dawes Commission over a period from 1896 to 1907, inclusive, and then only when it is affirmatively shown that petitioner actually received the benefit of such items, and that they were not disbursed in fulfillment of the agreement obligations of the United States owing to petitioner.

Reasons for Granting the Writ.

The reasons for requesting this Court to review this case are set forth as follows:

1. That there is a conflict in the holdings in the two decisions of the lower court on the same issues in this case; and
2. That important and novel questions are presented both in the affirmative case of petitioner and in the offset feature of the case.

In its former opinion the Court of Claims upheld the right of the Seminole Nation to recover on all the items herein presented (82 C. Cls. 135). Upon the review of the case, without passing on the merits of the items herein presented, this Court held that the lower court had no jurisdiction and dismissed the case (299 U. S. 417). The case was reinstated under authority of the Act of August 16, 1937, c. 651, 50 Stat. 650, and on January 6, 1941, the Court of Claims rendered a decision wholly inconsistent with its former decision on the same issues, and dismissed the case. Thus there are two conflicting decisions rendered by the same court on the same issues, creating confusion as to the correct determination of the questions involved, which this Court alone can finally settle.

With respect to the counterclaims we believe that the lower court erred as to many of the items allowed. These gratuity offsets are permitted to be charged against the legal and equitable claims of petitioner under authority of the Act of August 12, 1935, c. 508, 49 Stat. 571, 596. The questions presented under this phase of the case are important and novel, and have not been passed upon by this Court.

The items as to which a conflict of decision exists will be discussed separately below.

The main question with respect to items 1 to 4 is whether the United States is liable for its failure to make payments in the amounts and manner provided by its treaties and agreements with the Seminole Nation; unless otherwise directed by Congress.

The provisions of law chiefly relied upon by petitioner are found in the treaties of August 7, 1856, 11 Stat. 699, and March 21, 1866, 14 Stat. 755. Also the Act of July 26, 1866, c. 266, 14 Stat. 255, 280, which became Section 2097 of the Revised Statutes of the United States, quoted *supra*, p. 6.

Item 1.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, between the United States and the Seminole Nation, provided in part that:

"In consideration of such release, discharge and obligation, * * * The United States do therefore agree and stipulate as follows, viz.: To pay to the Seminoles now west, * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. * * *"

Congress appropriated the money annually to fulfill this obligation, totaling \$72,000, but \$10,436.58 only was disbursed for the objects specified in the treaty, leaving a balance due petitioner under this obligation of \$61,563.42, which is claimed herein.

In its decision of December 2, 1935, the lower court permitted recovery in the amount of \$61,563.42, pointing out that the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, providing for the diversion of annuities of the Five Civilized Tribes never became effective, and further that the release in Article 8 of the Treaty of March 21, 1866, had no application to the claim herein presented (82 C. Cls. 135, 146, 147).

However, in its later decision of January 6, 1941, the lower court erroneously held that said Act of July 5, 1862, applied to this treaty obligation, and that the release in the Treaty of March 21, 1866 barred recovery on this claim. We submit that the lower court here failed to give due consideration to the fact that the Act of July 5, 1862, never became effective as to the Five Civilized Tribes. This act is so worded that it does not become operative except, "dur-

ing the discretion and pleasure of the President," when the tribes mentioned shall be found to be in actual hostility to the Government of the United States. Upon being urged to act, President Lincoln refused and withheld judgment in the matter (American Indian Under Reconstruction, by Dr. Annie Heloise Abel, Lib. Cong., Call No. E 540.13A22, notes 496-497, pages 251-252).

Also the lower court failed to give proper consideration to the scope of the release in said Treaty of March 21, 1866. Article 8 of said Treaty of March 21, 1866, provides in part as follows:

"The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. * * *

The confirmation of the diversion of annuities was limited to those made "from the funds of the Seminole Nation," and covered claims arising out of the Civil War period. The Seminole Nation had funds to its credit in the United States Treasury at this time, which had been established under the Treaty of August 7, 1856, the interest on which was payable annually per capita. The release clearly applied to this interest, and no claim has been made for such diversions, though the record shows that \$249,731.88 of said interest was thus diverted and that but \$31,599.68 of said total was disbursed for Seminole Indians (R. 28-29). The claims herein sued upon were for the support of schools, agricultural assistance and smiths and smiths shops, which

were to be paid for from funds of the United States, and not from funds of the Seminole Nation. Furthermore, a large part of this claim was due and owing before the Civil War period and would not be covered by the release which provided for settlement of damages and claims growing out of the Civil War period.

We submit that of the two conflicting decisions the former one is correct as to this item of the claim. In that decision the court stated (82 C. Cls. 135, 147):

"The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of \$61,563.42."

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States invest for the Seminole Nation:

"... the sum of two hundred fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united

tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity: * * *

The combined Seminole fund was thereafter set up and interest thereon was paid by Act of March 3, 1859, c. 79, 11 Stat. 499.

Although the interest of \$25,000 was annually appropriated by Congress to fulfill this treaty obligation, yet during the period from 1867 to 1909, there was an underpayment of this treaty obligation.

In the first decision the lower court held that petitioner was entitled to recover for underpayments in the amount of \$154,551.28. (82 C. Cls. 135, 148-150.) In the second proceeding the court found that the following amounts were not disbursed for the treaty purpose but were nevertheless disbursed for the benefit of the Seminole Nation, and at the request of the Seminole council:

1870	17,821.00
1871	12,500.00
1872	12,500.00
1873	12,500.00
1874	11,101.64

and reduced the amount of recovery to \$13,501.10 (R. 25).

The lower court clearly was in error in allowing the above credits for the reason that these amounts admittedly were not disbursed for the purpose named in said treaty. The record herein, which was before the lower court and called to its attention, shows that the amounts of \$17,821.00 and \$11,101.64 were disbursed in 1870 and 1874, respectively, for payments to individuals purporting to have claims against the Seminole Nation and for payment of drafts on the Seminole Nation. Said Article 8 specifically

guarded the Seminole Nation against such payments as follows:

“but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws.”

The record shows that the Seminole officials would create claims in favor of themselves by calling councils on any pretext and voting themselves fees, all of which were of no benefit to the Seminole Nation (R. 61, 62-63). In this manner these officials would retain to themselves the tribal annuities to the exclusion of the other members of the tribe. In the face of this record, the lower court in its last opinion allowed the above credits against this treaty obligation.

The purported payments of \$12,500 each made in the fiscal years 1871, 1872 and 1873 were disallowed by defendant's own disbursing officers and were *never allowed as proper disbursements against this treaty obligation*. Notwithstanding this fact the lower court allowed such amounts as a credit against said treaty obligation.

The requests of the Seminole council that the United States pay this money to the tribal officers instead of per capita as required by the treaty would furnish no excuse for disregarding this treaty obligation and Section 2097 of the Revised Statutes. These requests of the Seminole officials were denied by the Commissioner of Indian Affairs and the Secretary of the Interior because they were not convinced that the Seminole Indians would get the benefit of this money (R. 61-62). It had been reported to the executive officers of the United States that the Seminole chiefs were stealing this money from the other members of the tribe in the manner above outlined (R. 62-63). Such requests of the Seminole tribal officials to have the tribal monies turned over to them so as to permit them to “gobble up”

the annuities due the tribe, and rob the other members of their share, which requests were denied by the executive officers of the United States clearly would be no defense to these illegal payments. Neither would it furnish a justification for the lower court in allowing such credits, nor support of finding that the Seminole Nation got the benefit of this money. As a lower court pointed out in its former decision (82 C. Cls. 135, 149):

“ * * * Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is without authority of offset against the plaintiff's claim.” *

That the amounts due on this treaty obligation were turned over to the United States agent in the fiscal years 1907-1909, inclusive, under the authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137, would not relieve the United States of its treaty obligation, unless it is shown that said agent paid said amounts per capita for these years.

We submit that the former decision of the lower court is the correct one to be followed as to this item.

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided in part as follows:

“The balance due the Seminole Nation after making said deductions, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest

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* See footnote p 20

of which shall be paid annually and appropriated to the support of schools."

This item claimed by petitioner was limited to the allowance made by the lower court in the first proceeding. Although the amount of \$2,500 was annually appropriated from 1867 to 1874, inclusive, yet \$16,902.80 only was disbursed for this treaty purpose, leaving a balance of \$3,097.20 due during this period. During the period 1875 to 1898 this annual payment was made to the Seminole tribal treasurer without authority of law and in violation of the treaty provision, and in 1907 the amount of \$750.00 was paid to the United States Agent under authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137. The lower court in its decision of December 2, 1935 rendered judgment for the above amounts, in all \$61,347.20, for the reason that such payments were not made in accordance with the treaty provision (82 C. Cls. 135, 151-152).

In its last decision the lower court permitted recovery of \$3,097.20 only, even though said other amounts were not disbursed in accordance with the treaty, and notwithstanding the fact that such disbursements were not authorized by law. The reason given is that the tribal officials disbursed \$7,500 annually for schools; this in the face of the record showing the wrongful manner in which the tribal officers were using the tribal funds. Clearly this reasoning of the lower court would not relieve the United States of disbursing this money for schools, in accordance with this treaty provision.

*This statement is equally applicable to the situation before us, as the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides "That funds appropriated and expended from tribal funds shall not be construed as gratuities". The Conference Report on the above bill (H. Rept. No. 1715, 74th Cong., 1 Sess., p. 8) states the intent of Congress in making this exception as follows: "expenditures from tribal funds are not to be considered as gratuity expenditures."

The sole excuse for such illegal payments was given in the first proceeding, that of the Act of April 15, 1874, c. 97, 18 Stat. 29.² The Court therein pointed out in its decision that said Act of 1874 did not apply to Treaty of March 21, 1866 funds, but was expressly limited by its terms to Treaty of August 7, 1856 funds (82 C. Cls. 135, 151-152).

We submit that the lower court was correct in its first decision and that it was not justified in its second decision in disregarding this treaty provision, or Section 2097, with respect to these treaty disbursements. There is no showing that the United States disbursed this amount for schools and in the absence of such a showing we submit that the petitioner is entitled to recover on this item of its claim.

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided as follows:

"Inasmuch as there are no agency buildings upon the new Seminole reservation it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (10,000) dollars, suitable agency buildings; the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected); which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

By the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, Congress appropriated \$10,000 to fulfill this treaty obligation, but this amount was returned to surplus. By Act of May

² This Act became effective on April 2, 1879 (R. 69).

18, 1872, c. 172, 17 Stat. 122, 132, Congress again appropriated \$10,000 to fulfill this treaty obligation, \$9,030.15 of which was disbursed for some other unknown purpose, and \$969.85 was returned to surplus. In 1870 and 1872 an amount of \$931.76 was expended from general appropriations for agency buildings and repairs (R. 15).

In its first decision of December 2, 1935, the lower court gave judgment for \$9,068.24, which represented the difference between the \$10,000 appropriated by Congress for this treaty purpose and the \$931.76 disbursed from general appropriations for agency buildings and repairs (82 C. Cls. 135, 152-153). In its second decision the lower court denied recovery upon the assumption that an agency building was erected on the Seminole reservation in 1873, and cited the report of the Commissioner of Indian Affairs for 1873, pp. 211-212, as evidencing this fact. This report shows that some sort of agency building was in the process of *being* constructed, but there is no showing that this building was ever completed. The sole amount shown to have been spent for this treaty purpose was \$931.76, and the United States is entitled to credit in this amount, as allowed in the first decision of the lower court. Clearly the disbursement of this \$931.76 was not a substantial compliance with this treaty obligation, especially when Congress definitely fixed the amount of this obligation by twice appropriating \$10,000 for this treaty purpose, and the record showed that the estimate for suitable agency buildings made by the United States Agent for the Seminoles exceeded the amount fixed by Congress for this treaty purpose (R. 60-61). Furthermore, the illegal disbursement of said \$9,030.15 was not only a violation of the treaty, but also the act of Congress appropriating same, and as such would be a plain violation of Sec. 2097 of the Revised Statutes, *supra*.

We submit that the first decision of the lower court with respect to this item is the correct one to be followed herein.

Item 5.

This item of petitioner's claim is based upon the illegal disbursement of Seminole tribal funds in violation of Section 19 of the Curtis Act, approved by Congress June 28, 1898, c. 517, 30 Stat. 495.

The sole question involved in this item is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe, and whether the Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

The basic question was passed upon in *Creek Nation v. United States*, 78 C. Cls. 474, 485, in which the court stated:

"That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Lone Wolf v. Hitchcock*, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Said Section 19 of the Curtis Act provides as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

The purpose of this provision is clearly shown by a review of the events leading up to its passage. We will comment upon them briefly.

Before the Curtis Act the Seminole tribal officials were entrusted with the disbursement of certain of its tribal income, the payments of which were authorized to be made to the tribal treasurer under the Acts of April 15, 1874, c. 97, 18 Stat. 29, and March 2, 1889, c. 412, 25 Stat. 980, 1004.

As early as 1869 it was called to the attention of the executive officers of the United States that the Seminole officials were monopolizing the tribal income. The report of T. A. Baldwin, the United States Agent for the Seminoles, dated Dec. 6, 1869, stated in part as follows:

"I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation, except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation.

"I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making returns to the department, upon rolls as if it had been paid per 'capita'.

"I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid unnecessary expenditure of money for Councils; etc. which are of but little benefit to the nation, (for example the last council held cost the nation \$700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

On August 9, 1875, Special United States Commissioner John P. C. Shanks reported to the Commissioner of Indian Affairs that the Seminoles were in bad hands; that the

tribal officers create large claims against the nation in favor of themselves, procure a resolution of the council endorsing them and issue warrants in favor of themselves for payment from tribal funds (R. 62).

On November 20, 1878, A. B. Meacham, United States Indian Agent for the Seminoles, reported that the Seminole Chiefs were "gobbling" up the annuities due the tribe, and robbing the other destitute members of ~~their just shares~~; and that "It is a perfect system of Bull-dozing the ignorant in order to live upon them" (R. 64).

In 1889 John F. Brown, Principal Chief of the Seminole Nation, and A. J. Brown, his brother, Seminole treasurer (the same officials who were in charge of Seminole affairs during the period of this claim—1898–1907), and Samuel J. Crawford, Ex-Governor of Kansas and an attorney, embezzled a large amount of money for lands sold under an agreement ratified by Act of March 2, 1889, c. 412, 25 Stat. 980, 1004. The amount was paid to the tribal treasurer, and it vanished from sight, and never reached the Seminoles (Sen. Doc. 105, 55 Cong., 2 Sess., pp. 3-4).

By Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the Dawes Commission was created for the purpose of negotiating with the Five Civilized Tribes for the allotment of their lands and the division of the funds equally among the members of said tribes. The annual reports of this Commission from 1894 to 1898 set forth the intolerable conditions existing within the tribal governments of the Five Civilized Tribes. The report, dated Nov. 20, 1894 (Repts. of Comm. to the F. C. T., pp. 68-70), states in part as follows:

"Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at conceal-

ment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available.

“The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly, through one of its own officers.

“Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. . . .”

In *Stephens v. Cherokee Nation*, 174 U. S. 445, 451-453, are set forth extracts from these and other reports showing the intolerable conditions existing within the governments of the Five Civilized Tribes, and of the great need of reform.

The manner in which Seminole tribal funds were being

disbursed by the Seminole officials had been called to the particular attention of Congress. In 1896, Congressman Flynn, of Oklahoma Territory, endeavored to put a stop to the methods used by Seminole officials in "gobbling up" Seminole annuities, by securing an amendment to the Indian Appropriation Act requiring this money to be disbursed by an officer designated by the Secretary of the Interior. We quote from the proceedings of the House for February 24, 1896 (Cong. Rec., 54th Cong., 1st Sess., p. 2070), as follows:

"Mr. Flynn: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

"The amendment was read, as follows:

"Insert, in line 15, page 27, after the word 'dollars', the following:

"'Provided, That the sums of money mentioned in this and the preceding paragraph shall be paid to said Indians by an officer designated by the Secretary of the Interior'.

"Mr. Flynn: * * * The object of this amendment, briefly stated, is this: There are about 2,000 Seminole Indians. The chief is Governor Brown. The treasurer is Jackson Brown, his brother. There are but two stores in the Seminole Nation, both owned by the Browns. This money is paid to Jackson Brown, the treasurer, and the Indians never see a dollar of it, but the Browns issue to the Indians duebills, good for so much in goods at the Browns' stores. The Browns have absolute control not only over the property, but I may say over the lives of these Indians. The Indians must take Browns' duebills for the amount of money that the Government pays them in annuities. I think, in justice to the Indians, in fairness to them this money should be paid by an officer designated by the Department, which will insure the Indians, instead of the storekeeper, getting all the money."

In 1897 Congressman Flynn again commented upon the manner in which Seminole funds were being monopolized

by these Seminole tribal officials and on the floor of the House stated as follows (Cong. Rec., Vol. 29, Pt. 2, 54th Cong., 2 Sess., p. 1261):

"Mr. Flynn: * * * If you want the Indians to obtain the money you appropriate for them, then you should see to it that the money is paid by an officer of the United States.

"It [tribal money] has been sent to the treasurers of the various tribes. If any individual Indian 'coughed up' enough to the officers of the tribe, probably he would get all that was coming to him, or probably he would not.

"This amendment is offered solely in the interest of the individual Indian. I am frank to acknowledge that it is against the monopoly now existing. As I stated when the amendment was offered and adopted last year, the governor of the Seminole tribe is named Brown, and the treasurer is his brother. They run the only stores in the Seminole Nation. When the money is paid from the Treasury of the United States to the treasurer of the Seminole Nation, the individual Indian never gets a single dollar, but is given a duebill, upon which he can obtain goods to a particular amount at Brown's store."

The Seminole Indians themselves protested to Congress the manner in which their tribal officials were using the Seminole tribal funds. In the protest of January, 1898 (Sen. Doc. 105, 55th Cong., 2nd Sess., pp. 3, 4), the Seminoles stated:

"The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. * * *

"We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and ac-

According to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. * * *

Awakened by these reports to the urgent need of reforming the then existing evils prevailing in the Indian Territory, both the executive and legislative branches of the United States Government combined to accomplish one general scheme or purpose—that of ridding the Indian Territory of these corrupt practices within the tribal governments by transferring the administration of the tribal property from the tribal officials to the officers of the United States, in order to insure to all the members of these tribes an equal share of the tribal estate.

The Curtis Act and the succeeding agreements with the Five Civilized Tribes had for their purpose, the creation of correct membership rolls of these tribes, the allotment of their lands in severalty, the sale of the surplus lands, the equalization of allotments, the per capita distribution of the remaining tribal funds, and the final winding up of the tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program Section 19 of the Curtis Act forbade payments of tribal moneys on any account whatever to the tribal officers for disbursement.

The Original Seminole Agreement, ratified by Act of Congress approved July 1, 1898, c. 542, 30 Stat. 567, provided generally for the enrollment of citizens and allotment of lands in severalty, the equalization of the value of allot-

ments, and the per capita payment of funds not used for said equalization of allotments, *to be paid by a person appointed by the Secretary of the Interior.*

Let us impress upon the Court that the Curtis Act and the agreements made with the various tribes were but a part of a single legislative scheme, worked out by the same officials, practically at the same time, and for the same purpose—that of preventing the robbery of the private citizens of the tribe by the crooked tribal officials, and the transferring of the administration of the tribal property and funds from these corrupt tribal officials to the United States Government.

However, as soon as the Curtis Act and the Seminole Agreement became effective the Seminole tribal officials sought to avoid them, and again employed Samuel J. Crawford to represent them. These officials and their attorney raised the question as to whether or not Section 19 was repealed by the Seminole Agreement. The Secretary of the Interior submitted the question to the Assistant Attorney General for the Interior Department, Willis Van Devanter, later Mr. Justice Van Devanter of the United States Supreme Court, who held that (82 C. Cls. 135, 157-158):

“I have therefore to advise that Section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same.”

The Seminole officials then had the Van Devanter opinion withdrawn and had the question transferred to the Comptroller of the Treasury for decision. The Comptroller held that Section 19 did not apply to the Seminole Nation. The fallacies of the reasoning in this opinion are pointed

out by the lower court in its decision of December 2, 1935, 82 C. Cls. 135, 157.

The Secretary disregarded the Van Devanter opinion and followed the Comptroller's opinion, and thereafter continued to turn Seminole tribal moneys over to the Seminole officials in violation of Section 19, until Attorney General Bonaparte put a stop to this manner of paying Seminole funds in an opinion involving the right of the Seminole officials to disburse Seminole funds under the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137. (See 26 Op. Attys Genl 340).

The Seminoles themselves wondered why their funds were not being disbursed by an officer of the United States. Their delegate wrote the Commissioner of Indian Affairs as follows (R. 64):

"A few years ago through your efforts a Bill was passed by Congress making the Seminole Annuity payable by the U. S. Indian Agent. This gave great satisfaction to all the tribe except the official class who through the representation of the Governor (Brown) that their salaries would cease to be paid, opposed it by a petition of his get up. Then for some reason to us unknown this law was set aside and the annuity has been paid through his manipulation and entirely to his wish. . . . They, the tribe, of course would like some say in the disposition of the funds. Can you give us any information on the subject and have we any recourse to have the law executed?"

During the whole period of petitioner's claim (1898-1907), and for many years before, the affairs of the Seminole Nation were under the control and domination of two brothers, John F. Brown, Principal Chief, and A. J. Brown, Seminole Tribal Treasurer. These officials were intelligent half-breed Indians. The Browns and C. I. Long (a white man) owned and operated a business enterprise known as the

Wewoka Trading Company. By means of a credit system, worked out through this company, the Browns "gobbled up" all of these Seminole annuities. Of all the moneys appropriated by Congress for the Seminoles the Indians would never see a dollar of it. Several months before the annuities were due from the Government, the Browns would require the Seminoles to accept scrip in the amount of the per capita due, entitling each holder to credit at the Wewoka Trading Company. Before the Indian received this scrip the Browns deducted a big per cent for interest, or a discount (R. 65-67): When the money was paid by the United States to A. J. Brown, Seminole Treasurer, the Browns would rake it all over into the tills of the Wewoka Trading Company. The Indians were required to go to Brown's store to redeem the scrip in goods. In many instances, not knowing what the scrip represented, the Indians threw it away. In this manner the Browns kept the Seminoles perpetually in debt to them, and thus were able to secure to themselves the Seminole annuities (R. 65-67).

The Seminole Treasurer was administrator in a payment of moneys due the Loyal Seminoles made during the period of our claim. Special Assistant United States Attorney P. L. Soper, in objecting to the approval of A. J. Brown's account by the Court; recommended that Brown be required to repay amounts deducted from shares for the Wewoka Trading Company and Samuel J. Crawford for an illegal attorney fee (the same Crawford who was involved in the 1889 steal, and who fought for the Browns to avoid the application of Section 19 as to the Seminole funds).

Mr. Soper reported that A. J. Brown, Seminole Treasurer and Vice President of the Wewoka Trading Company, did not pay the amounts due the Seminoles in cash but acted as collector for said company, deducting from the shares amounts due said company and an illegal attorney fee, and

then reported that said amounts were paid in cash (R. 64-65). He further states (R. 65):

"The testimony shows that books were issued and given to each claimant, containing a certain credit, upon which interest was charged from the beginning. Thus no record was ever kept of the nature, character and kind of goods, wares and merchandise each person obtained and the price paid for same. With adults this might not matter, but with minors it is of the utmost importance, especially taking into consideration the state of intelligence of the claimants, and especially the majority of those who testified before your Honor."

In commenting upon the above payment, Mr. Henry C. Lewis, an Investigator of the Department of Justice, expressed the view that the system of credit used by the Wewoka Trading Company was dishonest. When transmitting the report of Mr. Lewis to the Secretary of the Interior, the Acting Attorney General quotes from the report in part as follows (R. 65-66):

"It may not be inappropriate to make one or two observations upon this system of credit. * * * To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to

turn in the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

In 1916, Wm. L. Bowie, Special Investigator of the Department of the Interior, reported that the Browns were using their official positions to "advance their personal interests at the expense of the Indians under their authority" (R. 68). This report states in part as follows (R. 67):

"Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand. As governor, he issued the tribal scrip, and, as Indian trader, he held this scrip, requiring the Indians to whom it was issued to endorse it over to him, in payment of merchandise accounts, or for goods to be purchased by them. In this way the Browns monopolized the Indian trade, and it is stated, that if it had not been for poor business judgment used by them in specu-

lation and in bad business ventures, that they would be in splendid financial condition. . . . In recent years, they have been losing the Indian trade, and reliable persons have advised me that Governor Brown has been gradually losing the confidence of the members of his tribe."

The Interior Department officials called the Brown matter under investigation "the rawest graft deal" with which they had ever come in contact, and suggested that the only way to deal with "these tiger shore sharks" was to call for the resignation of the Browns (R. 68). This was done on September 22, 1916, and thus the curtain fell on Browns' activities (R. 69).

From this whole record it is evident that the so-called Seminole Government was of the Browns, by the Browns, and for the Browns, and the poor helpless Seminoles got little or nothing of the tribal annuities turned over to the Browns. It is a well known axiom that no man can serve two masters, and we have seen that the Browns, in their dual capacities as officials of the tribe and Indian traders, served but their own personal ends at the expense of the more ignorant and poorer members of the Seminole tribe.

In the first decision of the lower court judgment was rendered in favor of the Seminole Nation for \$864,702.58 representing the Seminole tribal moneys turned over to the Seminole officials in violation of Section 19 of the Curtis Act. The court said (82 C. Cls. 135, 156-158):

"The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all

members of the tribe would receive an equal share in the distribution of such funds. No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer.

“The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by law from doing so.”

In its last opinion the lower court held that Section 19 applied to the Seminole Nation; but limited its meaning to a prohibition against turning Seminole tribal moneys to the tribal officers for per capita payments only, and denied recovery on this item of petitioner's claim. The lower court said (R. 29):

“Except for the second clause of this section, it is perhaps true that the Act would have prohibited the payment to the tribal treasurer of all sums of whatever character and for whatever purpose they were to be used; but the word ‘but’ in the beginning of the second clause connects the second clause to the first and shows that Congress had in mind only the payments due to members of the tribe.”

The Court further states (R. 29) that the meaning of the first clause of the paragraph “is modified by the following one.”

Let us analyze the grammar of this section to determine whether or not this is correct. The first clause expresses an

entirely different thought from the second clause, and reads as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement."

The second clause expresses another independent thought, and reads as follows:

"... payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him;"

These two independent thoughts are joined by the word "but", appearing in the second clause before the word "payments." In "Advanced English Grammar," by Kittridge and Farley (Ginn & Co.), p. 152, the word "but" is given as one of the chief coordinate conjunctions; and at p. 151, *supra*, it is stated:

"A coordinate conjunction connects words or groups of words that are independent of each other."

Given two independent clauses, one could not modify the other; and, the coordinate conjunction "but" being used by Congress to connect these two independent clauses, the first clause could not modify the second clause. Therefore, Congress clearly intended that the first clause stand alone and prohibit all payments of any tribal moneys on any account whatever to the tribal officers for disbursement; and that the second clause direct that all disbursement of tribal moneys be made by the United States or an officer thereof; and that the third clause provide that per capita payments be made directly to each individual member of the tribe, without becoming liable for any previously contracted obligation.

In holding that Section 19 applied to Creek funds, Assistant Comptroller Mitchell, in his decision of August 30, 1898, 5 Comp. Dec. 93, 96, stated:

"There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19 of the act of June 28, 1898, *supra*. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise, by a disbursing officer of the United States the prohibition found in the first three lines was unnecessary. * * *

It is impossible to reconcile the lower court's last holding with the history of this legislation, as heretofore outlined. The whole purpose of the first clause of Section 19 was clearly, and we think correctly, set forth in the lower court's former opinion from which we have quoted, *supra*, pp. 35-36.

Furthermore, the manner of disbursing Seminole tribal moneys under Section 19 and under the Seminole Agreement, approved by Act of July 1, 1898, c. 542, 30 Stat. 567, was the same, as pointed out in the court's former opinion (82 C. Cls. 135, 157).

The claim under consideration does not involve a payment to the tribe a second time, but the proper payment of this money a first time. Under Section 19 the Seminole tribal officers could not represent the tribe in the receipt and disbursement of the tribal funds. By failing to follow the plain directions of Congress, the Secretary of the Interior paid the wrong parties and the United States is now liable to the rightful owner of said funds. In *Burnell v. United States*, 44 C. Cls. 535, 548, the court stated:

"Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust

fund applies to the government as well as to an individual trustee. (Borcherlin's Case, 35 C. Cls. R. 312, which was affirmed by the Supreme Court, 185 U. S. R. 223). It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

The lower court in its last opinion (R. 30) states:

"But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States. The Sac and Fox Indians, *supra*."

This statement of the lower court overlooks the fact that the Seminole Nation, and not individuals, is party plaintiff in this suit, and that the tribe is suing for annuities due the tribe which were paid to the wrong parties. The *Sac and Fox* case, 220 U. S. 481, cited in support of this statement has no application to the question now before us. In that case no question of a deliberate disregard of an Act of Congress by the Secretary of the Interior was involved, but this Court held that the Secretary had implicitly complied with the directions of Congress in paying the tribe its tribal annuities.

A careful analysis of the decision of this Court in the *Sac and Fox* case shows clearly that a *small band of individuals who had severed their connections with the tribe* sued the tribe for a part of the tribal annuities claimed to be

due said band, contending that the Secretary of the Interior had not followed the directions of Congress enacted for its benefit. This Court simply held that a direction to the disbursing officers of the United States providing how *tribal* annuities should be paid to the *tribe* would not give said band of individuals a vested right in *tribal annuities*; that the *tribe*, and not said band of individuals—who were not members of the *tribe*—had a vested right in *tribal annuities*; and also that the Secretary of the Interior had followed the directions of Congress in disbursing the *tribal annuities*.

In the case at bar the *tribe* is suing the United States for annuities due it by virtue of its treaties and agreements with defendant, which annuities were not paid to the *tribe* because of the failure of the Secretary of the Interior to follow the plain directions of Congress providing the manner of the payment of same to the *tribe*, and enacted expressly for the purpose of insuring to the *tribe* the benefit of its *tribal annuities*. Both decisions of the lower court hold that Section 19 was violated. However, in its later decision denying recovery for this violation, the lower court overlooks the principle that Congress has plenary power over the affairs of an Indian *tribe*.

The main question before the court is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian *tribe*. In *The Creek Nation v. United States*, 78 C. Cls. 474, 491, the court in passing upon this question stated:

“ * * * To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff *tribe*. * * * Such

payments were not only made without authority of law but were made in contravention of positive provisions of law. * * *

For the reasons stated above, we submit that the lower court was correct in its decision of December 2, 1935, 82 C. Cls. 135, wherein it held that Section 19 of the Curtis Act prohibited payments of all tribal moneys to the tribal officers "on any account whatever" for disbursement; that the manner of disbursement of tribal moneys under Section 19 and under the Seminole Agreement was the same; that Congress, and not the Secretary of the Interior, has plenary power over Indian Affairs; and that the United States is liable to the Seminole Nation for the failure of the Secretary to follow the plain directions of Congress as to the disbursement of Seminole tribal funds to the tribe.

Gratuity Offsets Allowed by Lower Court.

The questions on this phase of the case are novel, and have never been passed upon by the Court.

The Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provided in part as follows:

"Sec. 2. In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * * Provided, That expenditures made prior to the date of the law, treaty, agreement or Executive order under which the claims arise shall not be offset against the claims or claim asserted: * * * Provided further, That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *

Without proof or argument in support of its purported gratuity offsets the United States claimed the amounts disbursed for the items set forth in the lower court's Findings 11-18, inclusive (R. 17-20). Clearly, the United States is required to prove affirmatively that the amounts claimed as gratuity offsets were disbursed gratuitously and for the benefit of the petitioner, before such items are to be held to be gratuity offsets under said Act of August 12, 1935.

The findings set forth disbursements made during the periods as follows (R. 17-20):

Findings XI, XIV, period from the fiscal years 1857-1866;
Findings XII, XV, XVIII, from the fiscal years 1867-1898;
Findings XIII, XVI, XIX, from the fiscal years 1899-1934.

The lower court, without requiring proof or argument of the United States, allowed most of the items listed in these findings.

In Findings XI, XII, XIV, XV, and XVIII, covering the period from 1857-1898, the amounts shown to have been disbursed either directly for petitioner or jointly with the other Five Civilized Tribes, were disbursed chiefly for administrative expenses of United States incurred in fulfilling its treaty obligations with the petitioner.

The purposes for which the amounts were disbursed are listed as follows: Agency buildings and repairs; Fuel, light and water; Miscellaneous Agency expenses; Pay of Indian Agents; Pay of Interpreters; Transportation, etc., of supplies; Pay of miscellaneous employees; Annuity expenses; General Office expense; Hardware, glass, oil and paints; Pay and expenses of Indian Police; and Pay for skilled employees.

As the lower court pointed out in its decision of January 6, 1941, petitioner, the plaintiff below, contended that all of the above expenses were incurred by the United States in

fulfilling its treaty obligations with petitioner (R. 34). Let us outline briefly the treaty provisions under which these obligations of the United States arose.

The United States assumed the following obligations under the Treaty of August 7, 1856, 11 Stat. 699: to pay the Seminoles west certain sums; to pay interest on funds established therein which was directed to be distributed per capita annually by the United States (Article 8); to remove the Seminoles in Florida to the west and provide them with rations and subsistence during their removal and for 12 months thereafter, and to distribute among them clothing, etc. (Art. 9); to pay delegations of Seminoles to Florida to induce those east to remove west (Art. 10); to erect agency buildings and a council house (Art. 12); to remove intruders from their domain (Art. 15); to issue licenses to such persons as were authorized to trade within the domain (Art. 17); to protect them from domestic strife, hostile invasion, and from aggression from other Indians and whites (Art. 18); and to survey the boundaries of the reservation (Art. 21).

Other like obligations were assumed by the United States under the Treaty of March 21, 1866, 14 Stat. 755.

Thus it is evident that it would have been impossible for the United States to fulfill its treaty obligations with petitioner unless these disbursements were made. The United States was required to furnish an agent to carry out its obligations under these treaties, and to pay the annual annuities due the tribe. This service was promised the Seminoles for a given consideration on their part, and the Government was required to disburse this money to fulfill these treaty duties. Therefore, the amounts thus disbursed clearly would not be gratuity offsets, but would be disbursements of the United States made incidental to the carrying out of its treaty obligations with plaintiff.

We will comment upon one of these treaty obligations owing to petitioner. Article 15 of the Treaty of August 7, 1856, provided in part as follows:

" * * * all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;) with the following exceptions, viz.: such individuals with their families as may be in the employment of the Government of the United States;" etc.

Article 1 of the Treaty of March 21, 1866, 14 Stat. 755, provides;

" * * * In return for these pledges of peace and friendship, the United States guarantee them quiet possession of their country, and protection against hostilities on the part of other tribes; * * * Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States."

Thus, in one treaty the United States assumed an obligation that its agent would remove all intruders within the limits of the Seminole country, and in the other treaty the United States guaranteed to the Seminoles quiet possession of their country.

There was ample reason for these provisions. The Five Civilized Tribes had been driven from their homes east of the Mississippi by the inroads of the whites. The United States had removed them to lands west of the Mississippi and had agreed to isolate them from the white men. However, with the development of our country westward the white men settled the surrounding states and territories, and soon began again to intrude upon their western domains (1869 Rept. Comr. Ind. Aff., p. 418).

In 1876 the United States Indian Agent wrote the Commissioner of Indian Affairs as follows (1876 Rept. Comr. Ind. Aff., p. 63):

"Another great source of continued disturbance is the large number of unauthorized and irresponsible white intruders in the Territory. Vigorous measures ought at once to be adopted to carry into effect those treaty stipulations which guarantee to keep these nations free from persons not duly authorized by law to reside therein. Their number is constantly on the increase; in one county alone in the Chickasaw Nation it is estimated there are three thousand."

The duties of the United States Indian Agent for the Five Civilized Tribes agency, were outlined in his report to the Commissioner of Indian Affairs (1877 Rept. Comr. Ind. Aff., p. 107), as follows:

"My work has not been to protect these tribes from cold and hunger by furnishing them with clothing and food—these are not supplied by the United States Government—as much as it has been to protect them in their treaty rights, against the impositions and craftiness of dishonest white men. I would not intimate by this remark that there are no real good and honest white men among these tribes. There are very many, but those who are unscrupulous, selfish, unprincipled and indolent far outnumber them. And while the good and honest white people living here are slow to speak and act against the sins of the country, the latter are bold and reckless in their deeds of corruption; in fact, they control, to a large extent, the political and financial interests of the tribes; and the crimes charged upon the Indians in too many cases may be traced either directly to the influence or acts of corrupt, designing white men * * *"

(See also 1879 Rept. Comr. Ind. Aff., p. XLIV; 1881, *Ibid.*, p. 104).

In carrying out this treaty obligation—to remove intruders—an Indian Police force was organized, and used for this purpose (1883 Rept. Comr. Ind. Aff., p. 87). The United States Agent reported (1889 Rept. Comr. Ind. Aff., p. 240):

“Since I have been in charge of the agency the police have served effectively in removing intruders, suppressing crime, preserving peace, arresting criminals, guarding Government funds, and in many ways performing arduous and oftentimes dangerous duties
* * *

In 1885, United States Agent, Robert L. Owen (who later became U. S. Senator), reported (1885 Rept. Comr. Ind. Aff., p. 107):

“The United States agent is kept busy trying to determine who are intruders, of the great number reported to the agency as such; then putting them out the limits of the agency; and, lastly, keeping them out with a United States Indian police force. * * * The United States is available for this purpose, but it is like using a sledge-hammer to fan away the flies with—strong enough to crush the fly, but not nicely adjusted to the business.”

Thus we have outlined the duties of the United States Agent and it is evident that his efforts were chiefly confined to directing the work of protecting these tribes from white intruders, and attempting to remove them in fulfillment of the Government's treaty obligations with these tribes.

In denying the petitioner's contention—that these disbursements were treaty disbursements of the United States, and not gratuity offsets—the lower Court stated (R. 34):

“However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of Blackfeet, et al.

Tribes v. United States, 81 Ct. Cls. 101, 137, and Shoshone Tribe v. United States, 82 Ct. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets."

An examination of these cases shows that they have no application to the question now before us. These cases involved what is known as the "Wild Tribes", the treaties with which are separate and distinct from those of the Five Civilized Tribes. The question before the court in these cases was whether the administrative expenses were beneficial to the Indians, not whether these disbursements were incurred in the performance of the treaty obligations of United States owing to the tribe. In the *Blackfeet* case, 81 C. Cls. 101, 137, the court said:

"It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plaintiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed they did, to what extent. They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs. They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover."

The court in the *Shoshone* case, 82 C. Cls. 23, 93, merely quoted with approval the above language in the *Blackfeet* case.

In the case at bar the question is not one of benefit; but the question is whether the United States was required to maintain said agency in order that the duties and obligations assumed by it under the Treaties of 1856 and 1866 could be fulfilled. Clearly said administrative expenses,

as to the Seminole Nation, were incurred by the United States in fulfilling these treaty obligations, and would not be gratuity offsets against petitioner. Nevertheless the lower court charged said expenses to the petitioner.

We submit that the lower court erred in this holding, and we request this court to correct the error.

The item of "General office expense" was made from the appropriation "Commission, Five Civilized Tribes" (R. 71), and covers the expense of the Dawes Commission, created by Section 16 of the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, to negotiate with the Five Civilized Tribes for the extinguishment of their tribal governments and the allotment of their lands in severalty, "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

Under the then existing treaties with these tribes, they had been guaranteed the right of self-government, and the United States stipulated that, before a State or territory could properly be created out of their national domains, the consent of these tribes must be obtained (Creek and Seminole treaty of August 7, 1856, Art. 4, 11 Stat. 699). As we have seen, the United States was utterly unable to fulfill the obligations it undertook to remove white intruders, and to carry out its policy of isolating these tribes (Rept. of Dawes Comm., dated Nov. 20, 1894, Repts. Comm. F. C. T., p. 57). With the Indian country overrun with white intruders, the United States abandoned its policy of isolating these Five Civilized Tribes, and created the Dawes Commission to negotiate with them to free the United States from the requirements of its treaties with these tribes, which it found itself unable to perform; and to secure agreements with the tribes authorizing a transformation from the tribal estate held in common, to individual estates with title in the individual Indians, and with the ultimate end in view of incorporating this Territory into

a new State of the Union—a purpose clearly beneficial to the United States.

These negotiations were carried on by the Dawes Commission over a period of years during which time the Five Civilized Tribes refused to consider the proposed change. The item "General Office Expense" covers the expense of the Dawes Commission during the period of these negotiations. Clearly this expense is not chargeable to the Five Civilized Tribes, who vigorously opposed this change, and, only after the coercive provisions of the Curtis Act, were they subdued and forced to accept the Government's proposals.

Therefore, this item of expense was incurred by the United States in securing the release from its former treaty obligations with these tribes, and in furthering its change of policy toward them. We submit that the lower court erred in charging this item as a gratuity offset against petitioner.

PERIOD FROM 1899 TO 1934.

The lower court erred in charging the Seminole Nation with gratuity offsets of amounts disbursed by the United States in fulfilling its obligations under the Seminole agreements, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, and by Act of June 2, 1900, c. 610, 31 Stat. 250.

During the negotiations with the Seminole Nation for the Seminole Agreement, the Dawes Commission, on behalf of the United States, made certain proposals to the Seminoles upon which the agreement should be made. These proposals generally were that United States divide the lands of the Seminole Nation among its citizens, so as provide sufficient land for a home for each citizen to be inalienable for 25 years, or longer; that United States agree to put each allottee in possession of his allotment without expense to

him, and remove all intruders thereon; all invested funds, not devoted to school purposes, and other moneys, to be divided per capita among the citizens and paid by an officer of the United States (Rept. of Nov. 20, 1894, Comm. to F. C. T., pp. 64-65).

The Original Seminole Agreement as finally executed provided generally that the United States appraise and classify the Seminole lands, and divide and allot them equally among the members of the tribe, under direction and supervision of the Dawes Commission; that leases of mineral lands be approved by the Secretary of the Interior; that the United States take over and administer the Seminole school fund; that the homesteads of allottees be inalienable in perpetuity; that all Seminole moneys, after equalizing allotments, except the school fund, shall be paid per capita by an officer of the United States appointed by the Secretary of the Interior.

The Supplemental Seminole Agreement, approved by Act of June 2, 1900, c. 610, 31 Stat. 250, provided for the making of rolls upon which the distribution of Seminole property should be made; and provided for the manner in which the lands and funds belonging to allottees should descend to heirs upon the death of the allottees.

Thus in consideration of the Seminoles agreeing to give up their former mode of life and to give up their tribal holdings and to adopt the ways of the white man, the United States agreed to divide their tribal estate among the members of the tribe, and to perform the other obligations outlined in these Agreements.

The lower court, in holding that the petitioner was chargeable with the expenses incurred by the United States in carrying out its agreement obligations with petitioner, stated (R. 36):

"There was no express provision in the Seminole agreement that the United States should bear the ex

pense of the allotment of the Seminole lands, and the majority of the Court is of the opinion that an obligation to do so cannot be implied. *Choctaw Nation v. United States*, 91 Ct. Cls. 320."

Although no express provision is contained in the Seminole Agreement requiring the United States to bear the expense of the distribution of the Seminole tribal estate, yet a reference to the above mentioned, "Proposals to the Seminoles" made by the Dawes Commission to induce them to execute the agreement shows what obligations the United States would assume should said agreement be made. In consideration of the Seminoles' agreeing to give up their tribal holdings in lands, money, etc., the United States agreed to divide this tribal estate among the members of the tribe in accordance with the terms of said agreement.

We submit that the lower court should have applied the well settled rule set forth in 6 Ruling Case Law, p. 856, as follows:

"One who undertakes to accomplish a certain result agrees by implication to supply all the means necessary thereto. He is bound by implication to do everything necessary to enable him to perform his contract. If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred. In fact, it may be said that contracts impose on parties, not merely obligations expressed in them, but everything which, by law, equity, and custom, is considered incidental to the particular contract, or necessary to carry it into effect. * * *"

See also Vol. 3, *Williston on Contracts*, Sec. 1293; *Hall v. Luckman*, 107 N. W. 932, 933; *John O'Brien Lumber Co. v. Wilkinson*, 94 N. W. 337, 338.

In the American Law Institute Restatement of the Law on Contracts, Sec. 230, p. 310, it is stated:

"The standard of interpretation of an integration, except where it produces an ambiguous result, or is

excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person, acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

Under the circumstances surrounding the execution of these agreements with the Five Civilized Tribes, and in view of the propositions made to them by the Dawes Commission as to the obligations that the United States would assume under them, would it not be unreasonable to say that the United States would be excused from allotting the lands and dividing these estates because of the failure of these tribes to bear this expense? Would it be reasonable to assume that these tribes would have executed these agreements if they had understood that they would be required to pay this expense?

It has been the understanding of all branches of the Government that, under these agreements with the Five Civilized Tribes, the United States was to bear the expense of the administration of these estates and the division of them into individual holdings; and that as long as the individual Indians were restricted these agreements require the United States to protect them in their individual holdings. In harmony with this universal understanding is the statement contained in the General Accounting Office Report, which is as follows (R. 70):

"Pursuant to the aforesaid act (March 3, 1893), commissioners were appointed, who entered into separate agreements with the aforesaid nations of Indians, including the Seminole Nation. Said agreements provided generally that the United States should bear the expense of the administration or division of the tribal estates, which involved the allotment of lands in severalty; the survey, appraisalment, and sale of

certain lands; the survey and sale of town sites; and the leasing of certain mineral and oil lands. In carrying out said projects, there were also considerable expenses incurred by the United States in the removal of restrictions upon the alienation of lands of certain allottees; the investigation of leases fraudulently obtained; and other expenses, including the pay of commissioners, superintendents, inspectors, attorneys, and miscellaneous employees."

A mere glance of Findings 13 and 18 of the lower court (R. 17, 19) shows that most of the items set forth therein and charged to petitioner under the opinion of the lower court are expenses incurred by the United States in carrying out its agreement obligations to the Seminole Nation and the other Five Civilized Tribes.

In discussing the policy of the United States in affording to these tribes the necessary protection under the terms of the agreements made with them, this Court, in *Heckman v. United States*, 224 U. S. 413, 432-433, 437-438, stated:

"But in executing this policy, Congress was solicitous to conserve the interests of the Indians and to fulfill the national obligations, not simply by assuring an equitable apportionment of the property, but by safeguarding the individual ownership of allottees, through suitable restrictions which were designed to secure them in their possession and to prevent their exploitation.

.

"During the continuance of this guardianship, the right and duty of the nation to enforce by all appropriate means the restrictions designed for the security of the Indians cannot be gainsaid. While relating to the welfare of the Indians, the maintenance of the limitations which Congress has prescribed as a part of its plan of distribution is distinctly an interest of the United States. A review of its dealings with the tribe

permits no other conclusion. Out of its peculiar relation with these dependent people sprang obligations to the fulfillment of which the national honor has been committed. 'From their very weakness and helplessness, so largely due to the course of dealing of the Federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the Executive and by Congress and by this Court whenever the question has arisen.' (United States vs. Kagama, 118 U. S., 375, 384).'

Clearly the cost of carrying out the obligations of the United States assumed by it under the Seminole Agreements and the other Five Civilized Tribes, is to be borne by the United States.

Many of the items set forth in Finding 18, and allowed by the lower court as gratuity offsets, could not possibly be charges against the Seminole Nation, unless the United States can show affirmatively that they were a gratuity and further that they were beneficial to said tribe. For instance, the Seminole Nation had just one townsite which was disposed of under the terms of the Seminole agreement by the tribal officials, at no expense to the United States. Yet the Seminole Nation is charged with "Sale of town lots" and "Sale of town sites" (R. 20).

Although the item "Probate Expense" was disbursed for the benefit of individual restricted Indians having private estates under the control and supervision of the United States, in which the tribe had no interest, the title of the tribe having been extinguished by patent issued under the terms of the Seminole agreement, yet the Seminole Nation is charged with a part of this expense (R. 20).

Although within the Seminole Nation there was no coal or asphalt, yet it is charged with a part of "surveying segregated coal and asphalt lands", etc., and other expenses properly chargeable solely to the Choctaw and Chickasaw Nations (R. 20).

Although the amount of \$1,693,525.90 of the item "Education" was disbursed for the maintenance of the Cherokee Orphans Training School, at Tahlaquah, Cherokee Nation (R. 52-60), located miles away from the Seminole Nation, yet the Seminole Nation is charged 3.72 per cent of said amount, or \$62,999.16, notwithstanding the fact that the attendance records show that not a Seminole Indian was in attendance at this school (R. 72), and that the Seminole Nation maintained with tribal funds its own school for the education of its orphan children (R. 72).

Although the lower court found that from 1908 to 1928 the Seminole Nation composed approximately 3.08 per cent of the total population of the Five Civilized Tribes, as shown by the final rolls compiled by the Dawes Commission during the period from 1898 to 1907, yet the lower court charged the Seminole Nation 3.72 per cent, or .64 per cent too much of the total shown by said Finding 18 (R. 20).

Should this case come before the court on the merits we desire also to have it review the item of gratuity offset of \$165,847.17, paid by United States to correct its own error in erroneously moving the Seminoles on Creek lands, and promising to protect them in their improvements should the later surveys determine that said Seminoles had been located on Creek lands (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., pp. 4-7; R. 72-74).

We believe that we have amply demonstrated to the court the unfairness of the allowances made by the lower court in the gratuity offset phase of this case, and regret that the character and extent of these items would not permit us to analyze them in more detail.

We submit that the lower court erred in failing to require of defendant affirmative proof of the fact as to whether or not said items were a gratuity and also whether they benefited the Seminole Nation, before permitting a gratuity offset for them under said Act of August 12, 1935.

Conclusion.

For the reasons set forth above the petitioner believes that the lower court has failed to give due consideration to the treaties and statutes governing the rights of the parties in this proceeding, and therefore earnestly requests that this Honorable Court grant a writ of certiorari in this case.

Respectfully submitted,

PAUL M. NIEBELL,
W. W. PRYOR,

Attorneys for Petitioner.

C. MAURICE WEIDEMEYER,

Of Counsel.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION, *Petitioner,*

v.

THE UNITED STATES.

**ON WRIT OF CERTIORARI TO THE COURT OF
CLAIMS.**

PAUL M. NIEBELL,
W. W. PRYOR,
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Counsel for Petitioner.

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IN THE
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No. 348

THE SEMINOLE NATION, *Petitioner,*

v.

THE UNITED STATES.

**ON WRIT OF CERTIORARI TO THE COURT OF
CLAIMS.**

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Opinions Below.

The opinions of the Court of Claims (R. 8-39, 39-42) are reported in 93 C. Cls. 500, and 93 C. Cls. 534.

Jurisdiction.

The judgment of the Court of Claims was entered on January 6, 1941 (R. 39). Motion for a new trial filed in the proceedings was allowed as to certain items of the claim and overruled as to other items on May 5, 1941 (R. 39-43). The petition for a writ of certiorari was filed August 5, 1941, and

was granted October 13, 1941 (R. 74). The jurisdiction of this Court is invoked under Section 3 of the Act of February 13, 1925, c. 228, 43 Stat. 936, 939 (Sec. 288 of the Jud. Code as amended, 28 U. S. C. A. 129), as further amended by the Act of May 22, 1939, c. 140, 53 Stat. 752.

Statutes Involved.

The special jurisdictional act, approved May 20, 1924, c. 162, 43 Stat. 133, provides in part as follows:

"That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States."

"Sec. 3. In said suit the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against said Indian nation,

The Act of August 16, 1937, c. 651, 50 Stat. 650, provides as follows:

"That in suits heretofore filed in the United States Court of Claims by the Five Civilized Tribes under their respective Jurisdictional Act . . . plaintiffs therein shall have the right, prior to January 1, 1938, to amend their petitions to conform to any evidence heretofore filed in said suits, whether such amended petitions develop original claims or present new claims based upon said evidence; and jurisdiction be, and is hereby, conferred upon said Court of Claims, notwithstanding the lapse of time or statutes of limitation, to

hear, examine, adjudicate, and render judgment in any and all legal and equitable claims which may have been presented by said Indian Nations in any amended petitions heretofore filed, or which may be filed under the terms of this Act; and claims so presented shall be adjudicated by said court upon their merits as though presented by petition filed within the time limited by said respective original Jurisdictional Acts, as amended; and any case presenting claims which may have been dismissed upon the ground that new claims were set up by amended petition, after the expiration of the time limitation fixed in said original Jurisdictional Acts, as amended, shall be reinstated and retried by said court on their merits."

The Act of May 22, 1939, c. 140, 53 Stat. 752, provides as follows:

"In any case in the Court of Claims, including those begun under section 287 of this title, it shall be competent for the Supreme Court, upon the petition of either party, whether Government or claimant, to require, by certiorari, that the cause be certified to it for review and determination of all errors assigned, with the same power and authority, and with like effect, as if the cause had been brought here by appeal. In such event, the Court of Claims shall include in the papers certified by it the findings of fact, the conclusions of law, and the judgment or decree, as well as such other parts of the record as are material to the errors assigned, to be settled by the Court.

"The Court of Claims shall promulgate rules to govern the preparation of such record in accordance with the provisions of this section.

"In such cases the Supreme Court shall have authority to review, in addition to other questions of law, errors assigned to the effect that there is a lack of substantial evidence to sustain a finding of fact; that an ultimate finding or findings are not sustained by the findings of evidentiary or primary facts; or that there is a failure to make any finding of fact on a material issue."

In order to avoid repetition the provisions of the treaties and statutes involved in the several items of the claim will be set forth in the discussion of said items.

Questions Presented.

The questions presented are as follows:

1. Whether an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty; unless Congress, by subsequent legislation, provides that payments be otherwise made; and whether the United States is liable to the tribe for the balance of any moneys not so disbursed and expended.
2. Whether the Secretary of the Interior has plenary power over the funds of an Indian tribe, and can disburse tribal funds without the authority of Congress, and in contravention of the express prohibition by Congress against such disbursement.
3. Whether Congress by Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502) prohibited payments of tribal moneys to the tribal officers of the Five Civilized Tribes; and if so, whether the Secretary of the Interior was required to comply with this provision of law.
4. Whether the United States has the burden of proving affirmatively its gratuity offsets under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.
5. Whether the United States must prove affirmatively that amounts claimed by it as gratuity offsets were disbursed *gratuitously* and for the *benefit* of the Seminole Nation as such before said amounts are allowable as gratuity offsets under said Act of August 12, 1935.
6. Whether amounts disbursed by the United States as administrative expenses and incidental to the fulfillment of its treaty and agreement obligations to petitioner are gratuity offsets under said Act of August 12, 1935.

Statement.

The Act of May 20, 1924, *supra*, as amended, conferred upon the Court of Claims jurisdiction to adjudicate the legal and equitable claims of the Seminole Nation against the United States growing out of treaties, agreements and acts of Congress relating to Indian Affairs.

On February 24, 1930, the Seminole Nation filed suit under the above act. The trial of the case was delayed some four years for a general accounting of Seminole funds requested by the Government, and this accounting report was filed by the United States in the record of the Court below. On September 19, 1934, the Seminole Nation amended its petition to conform to the facts set forth in said accounting report, and the case was submitted to the Court of Claims on June 4, 1935. On December 2, 1935, the Court rendered a decision on the claims presented in the amended petition awarding judgment for \$1,317,087.27 in favor of the Seminole Nation (82 C. Cls. 135).

Upon a review of the above decision, this Court held that the amended petition embodied new claims raised for the first time therein, and, said petition having been filed after the expiration of the limitation for filing suits as fixed in the jurisdictional act, the Court of Claims had no jurisdiction to render the above judgment (*United States v. Seminole Nation*, 299 U. S. 417).

The case was reinstated under authority of the Act of August 16, 1937, c. 651, 50 Stat. 650, and a second amended petition was filed on November 8, 1937, limiting the claims therein presented to those found to be meritorious by the lower court in its decision of December 2, 1935. In this second proceeding, after trial upon the merits, the Court of Claims, on January 6, 1941, rendered a decision dismissing the petition and overruling in many respects its original decision of December 2, 1935. On motion for a new trial, several of the errors of this last decision were corrected by the lower court, and overruled as to others.

As the case now stands there are conflicting views expressed by the lower court upon the same issues, and this Court granted certiorari to review the case and clear up the existing confusion.

The claim herein presented is one of accounting, and consists of items falling generally within two classes:

1. Items as to which the United States failed to make payments in the amount and in the manner provided by its treaties and agreements with the Seminole Nation; and
2. An item as to which payments were made by the Secretary of the Interior out of Seminole trust funds without authority of law, and in contravention of positive directions of Congress forbidding such disbursements.

Items 1 to 4 (class 1) arise and grow out of the treaties of August 7, 1856 (11 Stat. 699) and March 21, 1866 (14 Stat. 755), between the United States and the Seminole Nation of Indians, and numerous acts of Congress which will be referred to and quoted in connection with the particular items of the claim to which they apply.

Item 5 (class 2) arises and grows out of Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495), and involves the construction of said provision of law.

The particular items of the claim will be outlined briefly below.

Item 1.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States disburse annually for ten years \$3,000 for the support of schools; \$2,000 for agricultural aid, and \$2,200 for the support of smiths and smith shops, a total obligation of \$72,000. Congress annually appropriated the amounts to fulfill this treaty obligation during the fiscal years 1857 to 1866, inclusive. However, \$10,436.58 only was so disbursed by the officers of the United States, and the balance of \$61,563.42 is claimed for the Seminole Nation (R. 11-12).

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, 702, provided for the establishment of a Seminole trust fund of \$500,000, and the annual interest thereon of \$25,000 was directed to be disbursed annually per capita to the members of the Seminole Nation. Although Congress annually appropriated the amounts to fulfill this treaty obligation from the fiscal years 1867 to 1909, inclusive, yet the officers of the United States failed either to disburse or apply to this treaty object a total of \$154,551.28, due for the fiscal years 1867-1874, 1876, 1879, and 1907-1909 (R. 12-13; 82 C. Cls. 135, 139-140, 148-150).

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States establish a permanent school fund of \$50,000 for the Seminole Nation, and the annual interest of \$2,500 on same was directed to be "paid annually to the support of schools." Although Congress annually appropriated said interest for the fiscal years 1867 to 1909, inclusive, yet a total of \$61,347.20 of said interest was not disbursed in accordance with the requirements of said treaty provision (R. 13-14; 82 C. Cls. 135, 141, 150, 152).

Item 4.

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided that the United States erect suitable agency buildings on the Seminole reservation "at an expense not exceeding ten thousand (\$10,000) dollars." Congress twice appropriated said \$10,000 by the Acts of July 28, 1866, c. 296, 14 Stat. 310, 319, and May 18, 1872, c. 172, 17 Stat. 122, 132, but neither of said amounts, nor any part thereof, was disbursed for said treaty purpose, though \$9,030.15 of the last appropriation was disbursed for some unknown purpose. However, \$931.76 was disbursed from general appropriations for agency buildings and repairs within the Seminole Nation, for which the United States has been credited. A

balance of \$9,068.24 is claimed under this treaty obligation (R. 14-15).

Item 5.

Section 19 of the Curtis Act (approved June 28, 1898, c. 517, 30 Stat. 495, 502, provided as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

A review of the history of this legislation shows that by the Act of April 15, 1874, c. 97, 18 Stat. 29 (which applied to Treaty of August 7, 1856 funds only), and the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, the Seminole tribal officers were entrusted with the disbursement of certain of the Seminole tribal income. The reports of the Dawes Commission for the years 1894 to 1898 state that the tribal governments of the Five Civilized Tribes were grossly corrupt; that the affairs of these tribes had fallen into the hands of a few energetic mixed-blood Indians and white men who were using the tribal funds to further their own personal interests, and were amassing large fortunes by robbing the other and more ignorant members of the tribe of their share of the tribal estate. Such activities of the Seminole tribal officials had been reported to the executive officers of the United States as early as 1869 (R. 60).

To put a stop to the dissipation of the tribal income of these tribes by the tribal officers, Congress, under the Curtis Act, assumed full administrative control over the property and affairs of the Five Civilized Tribes, directed the allotment of the tribal lands, and the equal division of the funds of said tribes among the members thereof. As a part of

this broad comprehensive scheme, said Section 19 forbade the payment of the tribal funds thereafter to the tribal officers on any account whatever for disbursement.

In utter disregard of this express prohibition of Congress, the Secretary of the Interior, during the fiscal years 1899 to 1907, inclusive, continued to pay over to the Seminole tribal officers the Seminole tribal moneys, and thus permitted the robbery of a helpless people to continue until it was stopped finally by an opinion of the Attorney General (26 Op. Atty's Gen. 340). The petitioner claims the sum of \$864,702.58 which was disbursed in direct contravention of this positive provision of law (R. 15).

Specification of Errors to be Urged.

As to the affirmative items 1 to 4 of petitioner's claim, the lower court erred in holding as its conclusions of law:

1. That an Indian tribe is not entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, and that the United States is not liable to the tribe for the balance not so disbursed or expended.

As to Item 1 particularly—the lower court erred in holding that the United States was authorized by the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, to divert for the relief of refugee Indians the amount of \$61,663.42 of the total required to be disbursed by the United States for schools, agricultural assistance, and smiths and smith shops under Article 8 of the Treaty of August 7, 1856; and that the release in Article 8 of the Treaty of March 21, 1866, affects the right of the Seminole Nation to recover for this unfulfilled treaty obligation.

As to Item 2 particularly—the lower court erred in finding, contrary to the evidence adduced, that the following amounts appropriated to fulfill Article 8 of the Treaty of August 7, 1856—requiring said moneys appropriated to be disbursed per capita to members of said tribe—were dis-

bursed by the United States for the benefit of the Seminole Nation, and in holding that the respondent is entitled to credit in said amounts, though disbursed in violation of said treaty provision:

1870.....	\$17,821.00
1871.....	12,500.00
1872.....	12,500.00
1873.....	12,500.00
1874.....	11,101.64

With respect to this item the lower court further erred in holding that the United States may disregard the provisions of Article 8 of said Treaty of August 7, 1856, directing the annual interest on the Seminole \$500,000 fund to be paid per capita to members of the tribe, and that the United States may disburse moneys appropriated by Congress to fulfill this treaty obligation for purposes and in a manner other than those specified in said treaty.

As to Item 3 particularly—the lower court erred in holding that the United States could disregard the provisions of Article 3 of the Treaty of March 21, 1866, requiring the United States to disburse \$2,500 annually for the support of schools within the Seminole Nation, and also in violation of said Section 2097 of the Revised Statutes of the United States, and thus avoid its responsibility by disbursing moneys other than in accordance with the said provisions of law.

As to Item 4 particularly—that the lower court erred in holding that the United States substantially complied with Article 6 of the Treaty of March 21, 1866, requiring it to construct suitable agency buildings on the Seminole reservation at an expense not exceeding \$10,000, by a disbursement of \$931.76 only for such purpose, after dissipating most of the \$10,000 appropriated by Congress to fulfill this treaty obligation and disbursing it for a purpose not shown.

2. That the lower court erred in holding substantially that the Secretary of the Interior, and not Congress, has

plenary power over the affairs of an Indian tribe, and that said Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

3. Further, the lower court erred in holding that Section 19 of the Curtis Act does not contain a broad and comprehensive prohibition against the payment of any tribal moneys on any account whatever to the tribal officers for disbursement, but that the meaning of said provision is limited to a prohibition against the payment of tribal moneys to the tribal officers for per capita payments only.

As to the counterclaims allowed, the lower court erred in holding and finding:

1. That the United States need not prove affirmatively that the items claimed as gratuity offsets under said Act of August 12, 1935, were disbursed gratuitously and for the benefit of the Seminole Nation before it is entitled to such offsets.

2. That the amounts disbursed by the United States for administrative expenses and as incidental to the performance of its treaty and agreement obligations with the Seminole Nation are gratuity offsets, rather than holding that said expense is to be borne by the United States as necessarily incidental to the performance of its treaty and agreement obligations with petitioner.

3. That the United States is entitled to a gratuity offset for \$165,847.17 disbursed by it in purchasing lands of the Creek Nation for the Seminoles, upon which lands the Seminoles had been erroneously located by the United States and encouraged to make valuable improvements in reliance upon the promise of the United States that if the first survey of the boundaries be found to be in error the United States would protect them in their improvements.

4. That the petitioner is chargeable with any part of the items of Education, Sale of town lots, Sale of town sites,

Probate expenses, General Office Expense, Surveying Segregated Coal and Asphalt Lands, and other like items of gratuity offset, without substantial evidence in the record to support such a charge against the petitioner."

5.. That petitioner is chargeable with a gratuity offset of 3.72 per centum of items totaling \$11,416,066.55 (Finding 18, R. 19-20) obtained by the use of population figures of the Five Civilized Tribes from 1866 to 1934, rather than a percentage of 3.08 based upon population figures shown by the final rolls of petitioner and the other Five Civilized Tribes made by the Dawes Commission over a period from 1896 to 1907, inclusive, and then only when it is affirmatively shown that petitioner actually received the benefit of such items, and that they were not disbursed in fulfillment of the agreement obligations of the United States owing to petitioner.

Summary of Argument.

Our argument with respect to items 1 to 4 of the affirmative claim of petitioner will be devoted to the application of the following general principle:

"... that an Indian tribe is entitled to have the full amount due it under the terms of a treaty with the United States disbursed in the manner and for the precise purposes named in the treaty, unless Congress by subsequent legislation provides that payments be otherwise made, and that the United States is liable to the tribe for the balance of any moneys not so disbursed and expended." *Seminole Nation v. United States*, 82 Ct. Cls., 135, 153-154).

In support of this principle the petitioner relies upon the various provisions of treaties setting forth the obligations of the United States, and Section 2097 of the Revised Statutes of the United States (Act of July 26, 1866, c. 266, 14 Stat. 255, 280) which provides that:

"No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner

not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law."

With respect to Item 5 of petitioner's claim, our argument will be devoted to the application of the following principle:

"That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Lone Wolf v. Hitchcock*, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements must be determined." *Seminole Nation v. United States*, 82 C. Cls. 135, 154; *Creek Nation v. United States*, 78 C. Cls. 474.

Our argument on the gratuity offset phase of this case may be summarized as follows:

1. That disbursements made to fulfill the treaty and agreement obligations of the United States have been improperly allowed as gratuity offsets against the legal claims of petitioner.
2. That disbursements have been wrongfully allowed as gratuity offsets against petitioner's legal claims without proper proof that said amounts were disbursed *gratuitously*, or for the *benefit* of the Seminole Nation as such.
3. That the mere recital of the Supplemental Report of the General Accounting Office, without further proof or argument, would not be sufficient evidence to support an allowance of a gratuity offset against petitioner.

Argument.

The identical claims herein presented were upheld by the lower court in its first decision (82 C. Cls. 135). In its second decision (93 C. Cls. 500, 534) the lower court refused

recovery. We will review each item of our claim in an endeavor to show the court that the first decision of the lower court was correct.

Item 1.0

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, between the United States and the Seminole Nation, provided in part that:

"In consideration of such release, discharge and obligation, * * * The United States do therefore agree and stipulate as follows, viz.: To pay to the Seminoles now west, * * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. * * *"

Congress appropriated the money annually to fulfill this obligation, totaling \$72,000, but \$10,436.58 only was disbursed for the objects specified in the treaty, leaving a balance due petitioner under this obligation of \$61,563.42, which is claimed herein.

In its decision of December 2, 1935, the lower court permitted recovery in the amount of \$61,563.42, pointing out that the Act of July 5, 1862, c. 135, 12 Stat. 512, 528, providing for the diversion of annuities of the Five Civilized Tribes never became effective, and further that the release in Article 8 of the Treaty of March 21, 1866, had no application to the claim herein presented (82 C. Cls. 135, 146, 147).

However, in its later decision of January 6, 1941, the lower court erroneously held that said Act of July 5, 1862, applied to this treaty obligation, and that the release in the Treaty of March 21, 1866 barred recovery on this claim. We submit that the lower court here failed to give due consideration to the fact that the Act of July 5, 1862 never became effective as to the Five Civilized Tribes. This act reads in part as follows:

"That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas and other affiliated tribes, may and shall be suspended or postponed wholly or in part at and during the discretion and pleasure of the President: Provided, further, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the Government. * * *

This act is so worded that it does not become operative except "during the discretion and pleasure of the President," when the tribes mentioned shall be found to be in actual hostility to the Government of the United States. Upon being urged to act, President Lincoln refused and withheld judgment in the matter (*American Indian Under Reconstruction*, by Dr. Annie Heloise Abel, Lib. Cong., Call No. E 540.13A22, notes 496-497, pages 251, 252).

Before the beginning of the Civil War (1861) and before there was any idea that the Five Civilized Tribes might become involved in it, the respondent had become indebted to petitioner under this treaty provision in substantially the whole amount claimed (*Seminole Nation v. The United States*, 82 C. Cls. 135, 147). This sum, with no thought of the Civil War, it had simply failed to pay, and the respondent is now endeavoring to use the Civil War as an excuse for its failure to pay this treaty obligation.

In passing upon this very question the lower court, in its first decision, said (82 C. Cls. 135, 146):

"The act of July 5, 1862, *supra*, was operative only 'during the discretion and pleasure of the President.' It is not shown that the President ever took any action under this statute either by declaring by proclamation the abrogation of 'all treaties' with the Seminoles, or

by directing that 'appropriations heretofore or hereafter made' to carry into effect treaty stipulations with them 'be suspended and postponed wholly or in part.' Without action on the part of the President the act by its own terms was ineffective."

We submit that this is a correct analysis of the situation with respect to the Act of July 5, 1862.

The Court knows from a reading of the history of this period that the Seminole Nation was, of all the Five Tribes, the most loyal to the Union. As we have seen, even President Lincoln refused to put into effect a punitive measure against these tribes. In the early stages of the war—though by treaty the United States was bound to protect the Seminoles from invasion—the Federal troops were withdrawn from Indian Territory, and it was overrun by Southern troops. The Seminoles were forced to abandon their homes and flee into Kansas, where they remained as refugees until after the War (1862 Rept. Comr. Ind. Aff., pp. 142-143; Ibid, 1863, p. 185). The United States Agent for the Seminoles, in reviewing this period stated in part as follows (1869 Rept. Comr. Ind. Aff., pp. 417, 418) +

" . . . They were driven from their homes, their property destroyed, their houses burned, and their stock driven off without compensation to their lawful owners. . . . Opothleyohola, with a band of loyal Creeks and Seminoles, in midwinter started with their women and children for Kansas, a distance of more than three hundred miles. Without adequate food and clothing they traveled on their weary march. They were pursued by men of their own race, and the bloody battles of Cedar and Bird Creeks attest the courage and patriotism of that good old man and his faithful followers. Freezing, starving and dying, they at length reached Kansas, and their able-bodied men immediately enlisted in the service of the government; and the history of the three Indian regiments present as honorable record as any of all the noble army that served the nation. When the war ended they were destitute and scattered from the Red River to Kansas. Again they sought the protection of the government.

They formed new treaties; they complied with all the conditions imposed upon them; . . . They took hold of the question of reconstruction and settled it at once, practically, peaceably, and firmly. They have reopened their schools and churches; have re-built their homes, and are fast becoming surrounded by stock, farms, and all the comforts of life. With such a record should not the government repay them for their losses, faithfully and promptly carry out all their treaty stipulations, repel the encroachments of white men, and pay them for their lands, and see that justice is done them in all their intercourse with white men?"

Also the lower court failed to give proper consideration to the effect of the release of said Treaty of March 21, 1866. Article 8 of said Treaty of March 21, 1866, provides in part as follows:

"The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called Confederate States. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. . . ."

Let us say frankly that we are unable to attack this release. It is "the supreme law of the land." Drawn up in the heat of reconstruction the above release can be said to be highly penal in nature, and is to be construed strictly. Surely it is not to be given an effect beyond its plain terms.

The confirmation of the diversion of annuities was limited to those made "from the funds of the Seminole Nation," and covered claims arising out of the Civil War period. The Seminole Nation had funds to its credit in the United States Treasury at this time, which had been established under the Treaty of August 7, 1856, the interest on which was payable annually per capita. The release clearly applied to this interest, and no claim has been made for such

diversions, though the record shows that \$249,731.88 of said interest was thus diverted and that but \$31,599.68 of said total was disbursed for Seminole Indians (R. 28-29). The amounts claimed herein were required by treaty to be disbursed by the United States for the support of schools, agricultural assistance, and smiths and smiths shops. These amounts were to be paid for from funds of the United States, and not from funds of the Seminole Nation. Furthermore, a large part of this claim was due and owing before the Civil War period and would not be covered by the release which provided for settlement of damages and claims growing out of the Civil War period.

As the lower court pointed out in its first opinion (82 C. Cls. 135, 146-147):

"The release stipulated in article VIII of the treaty of 1866, insofar as it relates to the diversion of Seminole funds by the Secretary of the Interior during the War of the Rebellion, covers only the diversion of annuity payments. As to these funds the Seminole Nation ratified and confirmed 'all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States.' The United States had diverted the sum of \$249,731.88 of Seminole moneys during the period of the Civil War—from the fiscal years 1862 to 1866—an amount largely in excess of the amount of annuity funds diverted. Had the release been intended to ratify and confirm the diversion of other than the annuity payments, we think such intention would have been expressly stated. The general language, 'The stipulations of this treaty are to be a full settlement of all claims of said Seminole Nation for damages and losses of every kind growing out of the late Rebellion', has no application and cannot be held to include this item of the Seminole claim for the reason that substantially the whole amount claimed was due and unpaid before the outbreak of the war and consequently is not one for 'damages and losses growing out of the War of the Rebellion.'"

We submit that of the two conflicting decisions the former one is correct as to this item of the claim. In that decision the court sums up the whole matter as follows (82 C. Cls. 133, 147):

"The simple facts are that the United States covenanted with the Seminole Tribe in article VIII of the treaty of 1856, as a part of the consideration for the treaty, to provide annually for them for a period of ten years fixed sums for the support of schools, for agricultural assistance, and for the support of smiths and smith shops among them. In the absence of subsequent specific enactment by Congress to the contrary, the United States was obligated to disburse the funds stipulated in the manner and for the purposes designated in the treaty. The United States failed to discharge this treaty obligation in full, having disbursed only a part of the amount for the purposes named in the treaty. The plaintiff tribe is entitled to recover the undisbursed balance of \$61,563.42."

Item 2.

Article 8 of the Treaty of August 7, 1856, 11 Stat. 699, provided that the United States invest for the Seminole Nation:

" * * * the sum of two hundred fifty thousand dollars, at five per cent per annum, the interest to be regularly paid over to them per capita as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them per capita as an annuity: * * *"

The combined Seminole fund was thereafter set up and interest thereon was paid by Act of March 3, 1859, c. 79, 11 Stat. 409.

Although the interest of \$25,000 was annually appropriated by Congress to fulfill this treaty obligation, yet during the period from 1867 to 1909, there were underpayments as follows (82 C. Cls. 135, 140, 148-150):

1867.....	\$12,500.00	1874.....	\$14,101.58
1868.....	450.00	1876.....	24,500.00
1869.....	.25	1879.....	454.00
1870.....	5,321.00	1907.....	12,500.00
1871.....	12,500.00	1908.....	25,000.00
1872.....	12,625.45	1909.....	25,000.00
1873.....	12,599.00		

In the first decision the lower court held that petitioner was entitled to recover for underpayments in the amount of \$154,551.28. (82 C. Cls. 135, 148-150.) In the second proceeding the court found that the following amounts were not disbursed for the treaty purpose but were nevertheless disbursed for the benefit of the Seminole Nation, and at the request of the Seminole council:

1870.....	17,821.00
1871.....	12,500.00
1872.....	12,500.00
1873.....	12,500.00
1874.....	11,101.64

and reduced the amount of recovery to \$13,501.10 (R. 25).

The lower court clearly was in error in allowing the above credits for the reason that these amounts admittedly were not disbursed for the purpose named in said treaty. The record herein, which was before the lower court and called to its attention, shows that the amounts of \$17,821.00 and \$11,101.64 were disbursed in 1870 and 1874, respectively, for payments to individuals purporting to have claims against the Seminole Nation and for payment of drafts on the Seminole Nation. Said Article 8 specifically guarded the Seminole Nation against such payments as follows:

"but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws."

The record shows that the Seminole officials would create claims in favor of themselves by calling councils on any pretext and voting themselves fees, all of which were of no benefit to the Seminole Nation (R. 61, 62-64). In this manner these officials would retain to themselves the tribal annuities to the exclusion of the other members of the tribe. In the face of this record, the lower court in its last opinion allowed the above credits against this treaty obligation.

The purported payments of \$12,500 each made in the fiscal years 1871, 1872 and 1873 were disallowed by defen-

dant's own disbursing officers and were *never allowed as proper disbursements against this treaty obligation.* ^(R. 46, 69-70) Notwithstanding this fact the lower court allowed such amounts as a credit against said treaty obligation.

The requests of the Seminole council that the United States pay this money to the tribal officers instead of per capita as required by the treaty would furnish no excuse for disregarding this treaty obligation and Section 2097 of the Revised Statutes. These requests of the Seminole officials were denied by the Commissioner of Indian Affairs and the Secretary of the Interior because they were not convinced that the Seminole Indians would get the benefit of this money if turned over to the tribal officers (R. 61-62). It had been reported to the executive officers of the United States that the Seminole chiefs were stealing this money from the other members of the tribe in the manner above outlined (R. 62-63). Such requests of the Seminole tribal officials to have the tribal moneys turned over to them so as to permit them to "gobble up" the annuities due the tribe, and rob the other members of their share, which requests were denied by the executive officers of the United States clearly would be no defense to these illegal payments. Neither would it furnish a justification for the lower court in allowing such credits, nor support a finding that the Seminole Nation got the benefit of this money. As the lower court pointed out in its former decision (82 C. Cls. 135, 149):

“Even if the plaintiff received the benefit of the payments, and that fact is not established, they were payments made outside of the provisions of the treaty and as such were gratuities which the court under the jurisdictional act is without authority to offset against the plaintiff's claim.”

This statement is equally applicable to the situation before us, as the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, provides "That funds appropriated and expended from tribal funds shall not be construed as gratuities." The Conference Report on the above bill (H. Rept. No. 1715, 74th Cong., 1st Sess., p. 8) states the intent of Congress in making this exception as follows: "expenditures from tribal funds are not to be considered as gratuity expenditures."

That the amounts due on this treaty obligation were turned over to the United States agent in the fiscal years 1907-1909, inclusive, under the authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137, would not relieve the United States of its treaty obligations, unless it is shown that said agent paid said amounts per capita for these years.

We submit that the former decision of the lower court is the correct one to be followed as to this item.

Item 3.

Article 3 of the Treaty of March 21, 1866, 14 Stat. 755, provided in part as follows:

"The balance due the Seminole Nation after making said deductions, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to-wit: * * * seventy thousand dollars to remain in the United States Treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools."

This item claimed by petitioner was limited to the allowance made by the lower court in the first proceeding. Although the amount of \$2,500 was annually appropriated from 1867 to 1874, inclusive; yet \$16,902.80 only was disbursed for this treaty purpose, leaving a balance of \$3,097.20 due during this period. During the period 1875 to 1898 this annual payment was made to the Seminole tribal treasurer without authority of law and in violation of the treaty provision, and in 1907 the amount of \$750.00 was paid to the United States Agent under authority of the Act of April 26, 1906, c. 1876, 34 Stat. 137. The lower court in its decision of December 2, 1935 rendered judgment for the above amounts, in all \$61,347.20, for the reason that such payments were not made in accordance with the treaty provision (82 C. Cls 135, 150-152).

In its last decision the lower court permitted recovery of \$3,097.20 only, even though said other amounts were not

disbursed in accordance with the treaty, and notwithstanding the fact that such disbursements were not authorized by law. The reason given is that the tribal officials disbursed \$7,500 annually for schools; this in the face of the record showing the wrongful manner in which the tribal officers were using the tribal funds. Clearly this reasoning of the lower court would not relieve the United States of the obligation to disburse this money for schools, in accordance with this treaty provision.

The sole excuse for such illegal payments was given in the first proceeding, that of the Act of April 15, 1874, c. 97, 18 Stat. 29.² The Court therein pointed out in its decision that said Act of 1874 did not apply to Treaty of March 21, 1866 funds, but was expressly limited by its terms to Treaty of August 7, 1856 funds (82 C. Cls. 135, 151-152).

We submit that the lower court was correct in its first decision and that it was not justified in its second decision in disregarding this treaty provision, or Section 2097, with respect to these treaty disbursements. There is no showing that the United States disbursed this amount for schools and in the absence of such a showing we submit that the petitioner is entitled to recover on this item of its claim.

Item 4

Article 6 of the Treaty of March 21, 1866, 14 Stat. 755, provided as follows:

"Inasmuch as there are no agency buildings upon the new Seminole reservation it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the Superintendent of Indian Affairs; in consideration whereof, the Seminole Nation hereby relinquish and cede forever to the United States one section of their lands upon which said agency buildings shall be directed (erected), which land shall revert to said nation when

² This Act became effective on April 2, 1879 (R. 69).

no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated."

By the Act of July 28, 1866, c. 296, 14 Stat. 310, 319, Congress appropriated \$10,000 to fulfill this treaty obligation, but this amount was returned to surplus. By Act of May 18, 1872, c. 172, 17 Stat. 122, 132, Congress again appropriated \$10,000 to fulfill this treaty obligation, \$9,030.15 of which was disbursed for some other unknown purpose, and \$969.85 was returned to surplus. In 1870 and 1872 an amount of \$931.76 was expended from general appropriations for agency buildings and repairs (R. 15).

In its first decision of December 2, 1935, the lower court gave judgment for \$9,068.24, which represented the difference between the \$10,000 appropriated by Congress for this treaty purpose and the \$931.76 disbursed from general appropriations for agency buildings and repairs (82 C. Cls. 135, 152-153). In its second decision the lower court denied recovery upon the assumption that an agency building was erected on the Seminole reservation in 1873, and cited the report of the Commissioner of Indian Affairs for 1873, pp. 211-212, as evidencing this fact. This report shows that some sort of agency building was in the process of being constructed, but there is no showing that this building was ever completed. The sole amount shown to have been spent for this treaty purpose was \$931.76, and the United States is entitled to credit in this amount, as allowed in the first decision of the lower court. Clearly the disbursement of this \$931.76 was not a substantial compliance with this treaty obligation, especially when Congress definitely fixed the amount of this obligation by twice appropriating \$10,000 for this treaty purpose, and the record showed that the estimate for suitable agency buildings made by the United States Agent for the Seminoles exceeded the amount fixed by Congress for this treaty purpose (R. 60-61). Furthermore, the illegal disbursement of said \$9,030.15 was not only a violation of the treaty, but also the act of Congress appro-

appropriating same, and as such would be a plain violation of Sec. 2097 of the Revised Statutes, *supra*.

We submit that the first decision of the lower court with respect to this item is the correct one to be followed herein.

Item 5.

This item of petitioner's claim is based upon the illegal disbursement of Seminole tribal funds in violation of Section 19 of the Curtis Act, approved by Congress June 28, 1898, c. 517, 30 Stat. 495.

The sole question involved in this item is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe, and whether the Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

The basic question was passed upon in *Creek Nation v. United States*, 78 C. Cls. 474, 485, in which the court stated:

"That Congress has plenary power over the administration of Indian affairs is well settled. *Cherokee Nation v. Georgia*, 5 Pet. 1; *Cherokee Nation v. Hitchcock*, 187 U. S. 294; *Lone Wolf v. Hitchcock*, 187 U. S. 553. The Secretary of the Interior has only such authority over the funds of Indian tribes as is confided in him by Congress. He cannot legally disburse and pay out Indian funds for purposes other than those authorized by law. This rule is the test by which the legal right of the Secretary of the Interior to make the disbursements involved must be determined."

Said Section 19 of the Curtis Act provides as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

The purpose of this provision is clearly shown by a review of the events leading up to its passage. We will comment upon them briefly.

Before the Curtis Act the Seminole tribal officials were entrusted with the disbursement of certain of its tribal income, the payments of which were authorized to be made to the tribal treasurer under the Acts of April 15, 1874, c. 97, 18 Stat. 29, and March 2, 1889, c. 412, 25 Stat. 980, 1004.

As early as 1869 it was called to the attention of the executive officers of the United States that the Seminole officials were monopolizing the tribal income. The report of T. A. Baldwin, the United States Agent for the Seminoles, dated Dec. 6, 1869, stated in part as follows (R. 60):

"I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation, except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation.

"I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making returns to the department, upon rolls as if it had been paid per 'capita'.

"I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid unnecessary expenditure of money for Councils, etc. which are of but little benefit to the nation, (for example the last council held cost the nation \$700.00 for edibles alone and did no business,) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

On August 9, 1875, Special United States Commissioner John P. C. Shanks reported to the Commissioner of Indian Affairs that the Seminoles were in bad hands; that the tribal officers create large claims against the nation in favor of themselves, procure a resolution of the council endorsing said claims and issue warrants in favor of themselves for payment from tribal funds (R. 62).

On November 20, 1878, A. B. Meacham, United States Indian Agent for the Seminoles, reported that the Seminole Chiefs were "gobbling" up the annuities due the tribe, and robbing the other destitute members of their just shares; and that "It is a perfect system of Bull-dozing the ignorant in order to live upon them" (R. 64).

In 1889 John F. Brown, Principal Chief of the Seminole Nation, and A. J. Brown, his brother, Seminole treasurer (the same officials who were in charge of Seminole affairs during the period of this claim—1898-1907), and Samuel J. Crawford, Ex-Governor of Kansas and an attorney, embezzled a large amount of money due the Seminole Nation for lands sold under an agreement ratified by Act of March 2, 1889, c. 412, 25 Stat. 980, 1004. The amount was paid to the tribal treasurer, and it vanished from sight, and never reached the Seminoles (Sen. Doc. 105, 55 Cong., 2 Sess., pp. 3-4).

By Act of March 3, 1893, c. 209, 27 Stat. 612, 645, the Dawes Commission was created for the purpose of negotiating with the Five Civilized Tribes for the allotment of their lands and the division of the funds equally among the members of said tribes. The annual reports of this Commission from 1894 to 1898 set forth the intolerable conditions existing within the tribal governments of the Five Civilized Tribes. The report, dated Nov. 20, 1894 (Repts. of Comm. to the F. C. T., H. Ex. Doc. No. 1, Pt. 5, 53 Cong.; 3 Sess., pp. LXVIII-LXX, Cong. Ser. 3305), states in part as follows:

"Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire

property of the Territory of any kind that can be rendered profitable and available.

“The large payments of moneys to the Indians of these tribes within the last few years have been attended by many and apparently well-authenticated complaints of fraud, and those making such payments, with others associated with them in the business, have, by unfair means and improper use of the advantages thus afforded them, acquired large fortunes, and in many instances private persons entitled to payments have received but little benefit therefrom. And worse still is the fact that the places of payments were thronged with evil characters of every possible caste, by whom the people were swindled, defrauded, robbed, and grossly debauched and demoralized. And in case of further payments of money to them the Government should make such disbursements to the people directly, through one of its own officers.

“Justice has been utterly perverted in the hands of those who have thus laid hold of the forms of its administration in this Territory and who have inflicted irreparable wrongs and outrages upon a helpless people for their own gain. * * *

In *Stephens v. Cherokee Nation*, 174 U. S. 445, 451-453, are set forth extracts from these and other reports showing the intolerable conditions existing within the governments of the Five Civilized Tribes, and of the great need of reform.

The manner in which Seminole tribal funds were being disbursed by the Seminole officials had been called to the particular attention of Congress. In 1896, Congressman Flynn, of Oklahoma Territory, endeavored to put a stop to the methods used by Seminole officials in “gobbling up” Seminole annuities, by securing an amendment to the Indian Appropriation Act requiring this money to be disbursed by an officer designated by the Secretary of the Interior. We quote from the proceedings of the House for February 24, 1896 (Cong. Rec., 54th Cong., 1st Sess., p. 2070), as follows:

"Mr. Flynn: Mr. Chairman, I offer the amendment which I send to the Clerk's desk.

"The amendment was read, as follows:

"Insert, in line 15, page 27, after the word 'dollars', the following:

"'Provided, That the sums of money mentioned in this and the preceding paragraph shall be paid to said Indians by an officer designated by the Secretary of the Interior'.

"Mr. Flynn: * * * The object of this amendment, briefly stated, is this: There are about 2,000 Seminole Indians. The chief is Governor Brown. The treasurer is Jackson Brown, his brother. There are but two stores in the Seminole Nation, both owned by the Browns. This money is paid to Jackson Brown, the treasurer, and the Indians never see a dollar of it, but the Browns issue to the Indians duebills, good for so much in goods at the Browns' stores. The Browns have absolute control not only over the property, but I may say over the lives of these Indians. The Indians must take Browns' duebills for the amount of money that the Government pays them in annuities. I think, in justice to the Indians, in fairness to them this money should be paid by an officer designated by the Department, which will insure the Indians, instead of the storekeeper, getting all the money."

In 1897 Congressman Flynn again commented upon the manner in which Seminole funds were being monopolized by these Seminole tribal officials and on the floor of the House stated as follows (Cong. Rec., Vol. 29, Pt. 2, 54th Cong., 2 Sess., p. 1261):

"Mr. Flynn: * * * If you want the Indians to obtain the money you appropriate for them, then you should see to it that the money is paid by an officer of the United States.

"It [tribal money] has been sent to the treasurers of the various tribes. If any individual Indian 'coughed up' enough to the officers of the tribe, probably he would get all that was coming to him, or probably he would not.

"This amendment is offered solely in the interest of the individual Indian. I am frank to acknowledge that

it is against the monopoly now existing. As I stated when the amendment was offered and adopted last year, the governor of the Seminole tribe is named Brown, and the treasurer is his brother. They run the only stores in the Seminole Nation. When the money is paid from the Treasury of the United States to the treasurer of the Seminole Nation, the individual Indian never gets a single dollar, but is given a duebill, upon which he can obtain goods to a particular amount at Brown's store."

The Seminole Indians themselves protested to Congress the manner in which their tribal officials were using the Seminole tribal funds. In the protest of January, 1898 (Sen. Doc. 105, 55th Cong., 2nd Sess., pp. 3, 4), the Seminoles stated:

"The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. * * *

"We beg leave to state further that we have no law regulating the bond of our treasurer or chief; and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. * * *

Awakened by these reports to the urgent need of reforming the then existing evils prevailing in the Indian Territory, both the executive and legislative branches of the United States Government combined to accomplish one general scheme or purpose—that of ridding the Indian Territory of these corrupt practices within the tribal governments by transferring the administration of the tribal prop-

erty from the tribal officials to the officers of the United States, in order to insure to all the members of these tribes an equal share of the tribal estate.

The Curtis Act and the succeeding agreements with the Five Civilized Tribes had for their purpose the creation of correct membership rolls of these tribes, the allotment of their lands in severalty, the sale of the surplus lands, the equalization of allotments, the per capita distribution of the remaining tribal funds, and the final winding up of the tribal affairs and the ultimate dissolution of the tribal governments. As a part of this comprehensive general program Section 19 of the Curtis Act forbade payments of tribal moneys on any account whatever to the tribal officers for disbursement.

The Original Seminole Agreement, ratified by Act of Congress approved July 1, 1898, c. 542, 30 Stat. 567, provided generally for the enrollment of citizens and allotment of lands in severalty, the equalization of the value of allotments, and the per capita payment of funds not used for said equalization of allotments, *to be paid by a person appointed by the Secretary of the Interior.*

Let us impress upon the Court that the Curtis Act and the agreements made with the various tribes were but a part of a single legislative scheme, worked out by the same officials, practically at the same time, and for the same purpose—that of preventing the robbery of the private citizens of the tribe by the crooked tribal officials, and the transferring of the administration of the tribal property and funds from these corrupt tribal officials to the United States Government.

However, as soon as the Curtis Act and the Seminole Agreement became effective the Seminole tribal officials sought to avoid them, and again employed Samuel J. Crawford to represent them. These officials and their attorney raised the question as to whether or not Section 19 was repealed by the Seminole Agreement. The Secretary of the Interior submitted the question to the Assistant Attorney General for the Interior Department, Willis Van De-

vanter, later Mr. Justice Van Devanter of the United States Supreme Court, who held that (82 C. Cls. 135, 157-158):

"I have therefore to advise that Section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same."

The Seminole officials then had the Van Devanter opinion withdrawn and had the question transferred to the Comptroller of the Treasury for decision. The Comptroller held that Section 19 did not apply to the Seminole Nation. The fallacies of the reasoning in this opinion are pointed out by the lower court in its decision of December 2, 1935, 82 C. Cls. 135, 157.

The Secretary disregarded the Van Devanter opinion and followed the Comptroller's opinion, and thereafter continued to turn Seminole tribal moneys over to the Seminole officials in violation of Section 19, until Attorney General Bonaparte put a stop to this manner of paying Seminole funds in an opinion involving the right of the Seminole officials to disburse Seminole funds under the provisions of the Act of April 26, 1906, c. 1876, 34 Stat. 137. (See 26 Op. Attys Genl 340).

The Seminoles themselves wondered why their funds were not being disbursed by an officer of the United States. Their delegate wrote the Commissioner of Indian Affairs as follows (R. 64):

"A few years ago through your efforts a Bill was passed by Congress making the Seminole Annuity payable by the U. S. Indian Agent. This gave great satisfaction to all the tribe except the official class who through the representation of the Governor (Brown) that their salaries would cease to be paid, opposed it by a petition of his get up. Then for some reason to us unknown this law was set aside and the annuity has been paid through his manipulation and entirely to his wish. * * * They, the tribe, of course would like some say in the disposition of the funds. Can you give us

any information on the subject and have we any recourse to have the law executed?"

During the whole period of petitioner's claim (1898-1907), and for many years before, the affairs of the Seminole Nation were under the control and domination of two brothers, John F. Brown, Principal Chief, and A. J. Brown, Seminole Tribal Treasurer. These officials were intelligent half-breed Indians. The Browns and C. I. Long (a white man) owned and operated a business enterprise known as the Wewoka Trading Company. By means of a credit system, worked out through this company, the Browns "gobbled up" all of these Seminole annuities. Of all the moneys appropriated by Congress for the Seminoles the Indians would never see a dollar of it. Several months before the annuities were due from the Government, the Browns would require the Seminoles to accept scrip in the amount of the per capita due, entitling each holder to credit at the Wewoka Trading Company. Before the Indian received this scrip the Browns deducted a big per cent for interest, or a discount (R. 65-67). When the money was paid by the United States to A. J. Brown, Seminole Treasurer, the Browns would rake it all over into the tills of the Wewoka Trading Company. The Indians were required to go to Brown's store to redeem the scrip in goods. In many instances, not knowing what the scrip represented, the Indians threw it away. In this manner the Browns kept the Seminoles perpetually in debt to them, and thus were able to secure to themselves the Seminole annuities (R. 65-67).

The Seminole Treasurer was administrator in a payment of moneys due the Loyal Seminoles made during the period of our claim. Special Assistant United States Attorney P. L. Soper, in objecting to the approval of A. J. Brown's account by the Court, recommended that Brown be required to repay amounts deducted from shares for the Wewoka Trading Company and Samuel J. Crawford for an illegal attorney fee (the same Crawford who was involved in the 1889 steal, and who fought for the Browns to avoid the application of Section 19 as to the Seminole funds).

Mr. Soper reported that A. J. Brown, Seminole Treasurer and Vice President of the Wewoka Trading Company, did not pay the amounts due the Seminoles in cash but acted as collector for said company, deducting from the shares amounts due said company and an illegal attorney fee, and then reported that said amounts were paid in cash (R. 64-65). He further states (R. 65):

"The testimony shows that books were issued and given to each claimant, containing a certain credit, upon which interest was charged from the beginning. Thus no record was ever kept of the nature, character and kind of goods, wares and merchandise each person obtained and the price paid for same. With adults this might not matter, but with minors it is of the utmost importance, especially taking into consideration the state of intelligence of the claimants, and especially the majority of those who testified before your Honor."

In commenting upon the above payment, Mr. Henry C. Lewis, an Investigator of the Department of Justice, expressed the view that the system of credit used by the Wewoka Trading Company was dishonest. When transmitting the report of Mr. Lewis to the Secretary of the Interior, the Acting Attorney General quotes from the report in part as follows (R. 65-66):

"It may not be inappropriate to make one or two observations upon this system of credit. * * * To charge a discount where goods are given on credit is not unusual, but the system under which it is charged by this company is manifestly unfair, for the reason that when the money is received by the Trading Company, the Indians may not have traded out all of the due bills which have been given them, or, in other words, all of the credit extended to them. The result is that a discount has been charged on a part, at least, of the amount given out in due bills, goods for which have not been obtained, while as a matter of fact, the Trading Company has the money in its possession representing such part for which goods have not been obtained, the Indians retaining the remaining due bills to be traded out in the future. It would seem that there should be a discount in favor of the Indians instead of the Trading Company. The Indians are at liberty to turn in

the remaining due bills, states Mr. Brown, but they never do so, another result of their pitiable ignorance. Indeed, some of them do not even understand what these due bills represent when they receive them. There is in the record the testimony of one girl who stated that she did not know what the due bills were and threw them away. In point of fact, she threw away so much money. It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

In 1916, Wm. L. Bowie, Special Investigator of the Department of the Interior, reported that the Browns were using their official positions to "advance their personal interests at the expense of the Indians under their authority" (R. 68). This report states in part as follows. (R. 67):

"Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand. As governor, he issued the tribal scrip, and, as Indian trader, he held this scrip, requiring the Indians to whom it was issued to endorse it over to him, in payment of merchandise accounts, or for goods to be purchased by them. In this way the Browns monopolized the Indian trade, and it is stated that if it had not been for poor business judgment used by them in speculation and in bad business ventures; that they would be in splendid financial condition. * * * In recent years, they have been losing the Indian trade, and reliable persons have advised me that Governor Brown has been gradually losing the confidence of the members of his tribe."

The Interior Department officials called the Brown matter under investigation "the rawest graft deal" with which they had ever come in contact, and suggested that the only way to deal with "these tiger shore sharks" was to call for the resignation of the Browns (R. 68). This was done on September 22, 1916, and thus the curtain fell on Browns' activities (R. 69).

From this whole record it is evident that the so-called Seminole Government was of the Browns, by the Browns, and for the Browns, and the poor helpless Seminoles got little or nothing of the tribal annuities turned over to the Browns. It is a well known axiom that no man can serve two masters, and we have seen that the Browns, in their dual capacities as officials of the tribe and Indian traders, served but their own personal ends at the expense of the more ignorant and poorer members of the Seminole tribe.

Chief Justice Cardozo, speaking for the Court of Appeals of the State of New York, in *Meinhard v. Salmon*, 164 N. E. 545, 546, said:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

Can it be said that the Seminoles got the benefit of the tribal moneys turned over to these officials in violation of Section 19 of the Curtis Act? And were these officials honest?

In the well considered first decision of the lower court judgment was rendered in favor of the Seminole Nation for

\$864,702.58 representing the Seminole tribal moneys turned over to the Seminole officials in violation of Section 19 of the Curtis Act. The court said (82 C. Cls. 135, 156-158):

"The undoubted purpose of this provision was to forever put an end to the intolerable conditions brought about by permitting the tribal governments to receive and disburse tribal moneys due them from the United States. It was to prevent unscrupulous tribal officers and corrupt designing persons associated with them from diverting to their own use and profit tribal funds, the common property of the tribe, and to insure that all members of the tribe would receive an equal share in the distribution of such funds. No more wholesome or humane provision was ever written into an Indian statute, and the Seminole Indians were entitled to its protection in the distribution of all tribal income due them from the United States. This protection, however, was not afforded them, and a continuation of the 'irreparable wrongs and outrages upon a helpless people' was made possible by payment thereafter of large sums of their tribal funds to the tribal treasurer.

"The Secretary of the Interior was therefore without legal authority to pay Seminole tribal funds into the Seminole tribal treasury. More than that he was plainly prohibited by law from doing so."

In its last opinion the lower court held that Section 19 applied to the Seminole Nation, but limited its meaning to a prohibition against turning over Seminole tribal moneys to the tribal officers for per capita payments only, and denied recovery on this item of petitioner's claim. The lower court said (R. 29):

"Except for the second clause of this section, it is perhaps true that the Act would have prohibited the payment to the tribal treasurer of all sums of whatever character and for whatever purpose they were to be used; but the word 'but' in the beginning of the second clause connects the second clause to the first and shows that Congress had in mind only the payments due to members of the tribe."

The Court further states (R. 29) that the meaning of the first clause of the paragraph "is modified by the following one."

Let us analyze the grammar of this section to determine whether or not this is correct. The first clause expresses an entirely different thought from the second clause, and reads as follows:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement."

The second clause expresses another independent thought, and reads as follows:

"... payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him."

These two independent thoughts are joined by the word "but", appearing in the second clause before the word "payments." In "Advanced English Grammar," by Kittredge and Farley (Ginn & Co.), p. 152, the word "but" is given as one of the chief coordinate conjunctions; and at p. 151, *supra*, it is stated:

"A coordinate conjunction connects words or groups of words that are independent of each other."

Given two independent clauses, one could not modify the other; and, the coordinate conjunction "but" being used by Congress to connect these two independent clauses, the first clause could not modify the second clause. Therefore, Congress clearly intended that the first clause stand alone and prohibit all payments of any tribal moneys on any account whatever to the tribal officers for disbursement; and that the second clause direct that all disbursement of tribal moneys be made by the United States or an officer thereof; and that the third clause provide that per capita payments be made directly to each individual member of

the tribe, without becoming liable for any previously contracted obligation.

In holding that Section 19 applied to Creek funds, Assistant Comptroller Mitchell, in his decision of August 30, 1898, 5 Comp. Dec. 93, 96, stated:

"There does not seem to be room for serious doubt as to the meaning of the opening lines of section 19 of the act of June 28, 1898, *supra*. They import a plain, unqualified, and comprehensive prohibition of all payments by the United States to the tribal governments, or any officer thereof, on any account whatever for disbursement. Had the intent been simply to provide for payments to members of the tribes, either per capita or otherwise, by a disbursing officer of the United States the prohibition found in the first three lines was unnecessary. * * *"

It is impossible to reconcile the lower court's last holding with the history of this legislation, as heretofore outlined. The whole purpose of the first clause of Section 19 was clearly, and we think correctly, set forth in the lower court's former opinion from which we have quoted, *supra*, p. 37.

Furthermore, the manner of disbursing Seminole tribal moneys under Section 19 and under the Seminole Agreement, approved by Act of July 1, 1898, c. 542, 30 Stat. 567, was the same, as pointed out in the court's former opinion (82 C. Cls. 135, 157).

The claim under consideration does not involve a payment to the tribe a second time, but the proper payment of this money a first time. Under Section 19 the Seminole tribal officers could not represent the tribe in the receipt and disbursement of the tribal funds. By failing to follow the plain directions of Congress, the Secretary of the Interior paid the wrong parties and the United States is now liable to the rightful owner of said funds. In *Burnell v. United States*, 44 C. Cls. 535, 548, the court stated:

"Hence, the general rule that a trustee is bound, at his peril, to see to the proper application of the trust fund applies to the government as well as to an individual trustee. (*Borcherlin's Case*, 35 C. Cls. R.

312, which was affirmed by the Supreme Court, 185 U. S. R. 223). It must, therefore, be apparent that if the treasury department in the case at bar made payment out of a fund which it held in trust, through a mistake of law, to the party in law not entitled to receive the same, it transcended its authority and is responsible therefor to the rightful owner of the funds."

The lower court in its last opinion (R. 30) states:

"But although the Curtis Act did prohibit the making of these per capita payments to the tribal treasurer, and they were so made in violation of its terms, still we do not think the tribe is entitled to recover. The passage of the Curtis Act did not create in the individual Indians any vested rights. It does not amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States. The Sac and Fox Indians, *supra*."

This statement of the lower court overlooks the fact that the Seminole Nation, and not individuals, is party plaintiff in this suit, and that the tribe is suing for annuities due the tribe which were paid to the wrong parties. The *Sac and Fox* case, 220 U. S. 481, cited in support of this statement has no application to the question now before us. In that case no question of a deliberate disregard of an Act of Congress by the Secretary of the Interior was involved, but this Court held that the Secretary had implicitly complied with the directions of Congress in paying the tribe its tribal annuities.

A careful analysis of the decision of this Court in the *Sac and Fox* case shows clearly that a *small band of individuals who had severed their connections with the tribe* sued the tribe for a part of the tribal annuities claimed to be due said band, contending that the Secretary of the Interior had not followed the directions of Congress enacted for its benefit. This Court simply held that a direction to the disbursing officers of the United States providing how *tribal annuities* should be paid to the *tribe* would not give said

band of individuals a vested right in tribal annuities; that the tribe, and not said band of individuals—who were not members of the tribe—had a vested right in tribal annuities; and also that the Secretary of the Interior had followed the directions of Congress in disbursing the tribal annuities.

• In the case at bar the tribe is suing the United States for annuities due it by virtue of its treaties and agreements with defendant, which annuities were not paid to the tribe because of the failure of the Secretary of the Interior to follow the plain directions of Congress providing the manner of the payment of same to the tribe, and enacted expressly for the purpose of insuring to the tribe the benefit of its tribal annuities. Both decisions of the lower court hold that Section 19 was violated. However, in its later decision denying recovery for this violation, the lower court overlooks the principle that Congress has plenary power over the affairs of an Indian tribe.

The main question before the court is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe. In *The Creek Nation v. United States*, 78 C. Cls. 474, 491, the court in passing upon this question stated:

“ * * * To hold that the Secretary of the Interior had the legal right to expend such funds, in the face of positive prohibition against their expenditure without specific appropriation would be equivalent to holding that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe. * * * Such payments were not only made without authority of law but were made in contravention of positive provisions of law. * * * ”

For the reasons stated above, we submit that the lower court was correct in its decision of December 2, 1935, 82 C. Cls. 135, wherein it held that Section 19 of the Curtis Act prohibited payments of all tribal moneys to the tribal officers “on any account whatever” for disbursement; that the manner of disbursement of tribal moneys under Section

19 and under the Seminole Agreement was the same; that Congress, and not the Secretary of the Interior, has plenary power over Indian Affairs; and that the United States is liable to the Seminole Nation for the failure of the Secretary to follow the plain directions of Congress as to the disbursement of Seminole tribal funds to the tribe.

Gratuity Offsets Allowed by the Lower Court Finding 10 (R. 16).

Before discussing the other items of gratuity offsets allowed by the lower court under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, we desire to call the court's attention to an item of offset in the amount of \$165,847.17, which was allowed against petitioner by the lower court.

Our position with respect to this item is that it involves no element of gratuity, but constitutes an element of reparation, in that the disbursement was made to correct the Government's own error in locating the Seminoles on the wrong lands, and to settle the Government's own liability for improvements made thereon by the Seminoles.

The claim of respondent for \$175,000 arises out of a provision contained in the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, authorizing payment to the Creek Nation of \$175,000 for 175,000 acres of Creek lands purchased by the United States for the Seminoles. The history of the acquisition of said 175,000-acre Seminole tract is as follows:

By treaty of June 14, 1866, 14 Stat. 785, the Creek Nation ceded to the United States the west half of its entire domain, and retained the east half as its permanent national domain. Said lands were "to be divided by a line running north and south" (Article 3). By Treaty of March 21, 1866, 14 Stat. 755, the Seminole Nation purchased as its national domain 200,000 acres of the lands to be ceded by the Creeks, immediately west of and adjoining said Creek "dividing line."

Because of the homeless condition of the Seminoles growing out of the Civil War (they having been driven into

Kansas as refugees)—before said Creek "dividing line" was established—the officers of the United States removed them to and placed them upon what was believed to be the new 200,000-acre national domain granted to them in said Treaty of March 21, 1866, and respondent's officers encouraged them to settle down and make improvements as rapidly as possible (R. 72).

When this treaty was executed the Seminoles were promised that their new domain would be surveyed in the fall of 1866, but this was not done (R. 72).

In 1868 the first attempt was made by the United States to survey the Creek "dividing line" which was also to be the eastern boundary of the Seminole 200,000-acre tract. Under direction of the Commissioner of Indian Affairs, one Rankin, in 1868, surveyed this line. The Seminoles were shown the Rankin line by defendant's officers, and were told that this was their eastern boundary, and those who were located east thereof were moved west of this line (R. 72).

However, the Creeks objected to this survey, claiming that said line had been run too far east. The Seminoles became alarmed at the prospect of being forced to move again, but were assured by respondent's officers that they would not be disturbed even if the Rankin survey were found to be erroneous, and that they would be protected in their improvements (R. 72-73; Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2).

The Rankin survey was found to be erroneous and was not approved, but no immediate steps were taken by respondent to correct this error or to establish the correct Creek "dividing line" (Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 5; R. 73).

Finally, in 1871, the Creek "dividing line" was resurveyed and established by Frederic W. Bardwell, and this survey was approved on February 5, 1872. This Bardwell line was placed 7 miles west of the Rankin line, and the large area between the two lines, then estimated at 175,000 acres, and occupied by the Seminoles, was thrown within the boundaries of the Creek Nation. During the four-years

interval between the Rankin and Bardwell surveys the Seminoles had occupied this area believing, and being assured by respondent's officers, that this was a part of their new national domain, and had built homes and made other extensive and valuable improvements on these lands (Sen. Ex. Doc. 126, 51st Cong., 1 Sess., p. 9).

Disputes between the Creek and Seminole Nations soon arose over the jurisdiction of this area, and the Seminoles were much discouraged over the prospect of having to move again and reestablish their homes. As the United States Agent for the Seminoles stated in his report to the Commissioner of Indian Affairs, dated September 25, 1872 (1872 Rept. Comr. Ind. Aff., p. 241):

"It is to be hoped that the Seminoles will be protected in their just title to their present homes, and that the Government will urge upon the Creek authorities a speedy settlement of the disputed title of the Seminoles to the lands upon which the Government placed them, and which they have improved with more assiduity and care than their neighbors. Many of them are still in doubt whether their lands and improvements will be secured to them, and this uncertainty in this class of Indians is exceedingly discouraging and rests like an incubus upon their energies and labors.

"The Seminoles do not feel, and, I think, very justly, that they are a party in the settlement of this matter, excepting as a protesting party against their removal from this to a new country. They say that they purchased of the United States Government a certain amount of land, adjoining the Creek country on the west; that the Government showed them their boundaries, and located them, and told them this was to be their future home, and for them to go to work and improve it, and they have done so in good faith, and they are now happy and contented. And if their improvements have been made upon Creek soil, which is evidently the fact, the Government, and not they, is responsible, and they look to the Government to secure them in their rights and protect them in their present homes."

And as the Commissioner commented to the Secretary of the Interior in this same report, pp. 36-37, as follows:

"* * * A cause of discontent and just complaint on the part of this people is found in the fact that the Government, in providing them a new home, after the cession of their reservation under the treaty of 1866, misled them as to their boundary-line, so that many have settled beyond the line, upon territory still belonging to the Creeks, and have there established themselves in comfortable homes and upon lands which they have very much improved. The Seminoles so situated are troubled and discouraged, having no security as to their possession of the lands and improvements thereon, so occupied. As the mistake was not theirs, they look to the Government to adjust the matter with the Creeks, and to secure them in their rights and in the possession of their present homes. The Department has the matter under careful advisement, and will earnestly seek to avoid any unfortunate issue of the complication. So soon as the best method of saving at once the rights of the Creeks and the equities of the Seminoles shall be determined, Congress will be asked to provide the requisite authority for the adjustment of the question."

Accordingly Congress, by Act of March 3, 1873, c. 322, 17 Stat. 626, authorized negotiations with the Creek Nation for the cession of 175,000 acres of its domain, the respondent believing that such a purchase would cover all of the Creek lands then occupied and improved by the Seminoles.

On February 14, 1881, the Creek Nation ceded to the United States 175,000 acres of its national domain for \$175,000, and by Act of August 5, 1882, c. 390, 23 Stat. 257, 265, Congress appropriated \$175,000 for said lands, which amount was paid to the Creek Nation. (*See Creek Nation v. United States*, 93 Ct. Cls. 561, 562-563).

In reporting on this purchase, and submitting a draft of the legislation necessary to rectify this matter, Acting Commissioner of Indian Affairs, Thos. M. Nichol, wrote the Secretary on February 18, 1881, as follows (Sen. Ex. Doc. No. 75, 47th Cong., 1 Sess., p. 7, Cong. Ser. 1989):

"As shown in the foregoing, the homeless condition of the Seminoles, and their unwelcome occupation of lands belonging to another tribe, as well as the necessity of settling them somewhere as soon as possible, in order to enable them to commence to support their families, led the Government to locate them on what, at the time, was supposed to be the land that would enure to them, when the 'dividing line' should be surveyed, but which, upon the correct survey of the line, was found to be included in the Creek reserve. That they were thus erroneously located, is under the circumstances, not to be wondered at, but certainly it was through no fault of the Seminoles, and the Government should therefore pay the Creeks for the lands sought to be purchased, and should also meet the expense of the survey thereof. The Seminoles certainly should not be required to do this, especially when it is considered that they received only fifteen cents an acre for the country relinquished by them in the treaty of 1866, while the United States paid the Creeks thirty cents per acre for the half of their domain ceded to the United States, and then charged the Seminoles fifty cents an acre for the part of the same land sold to them, and only after the lapse of nine years made up to them the difference in price."

The eastern boundary of the 175,000-acre tract was surveyed in 1888 by respondent's officer, H. C. F. Hackbusch. Concerning said east boundary, said Hackbusch reported as follows (*Creek Nation v. United States*, 93 Ct. Cls. 561, 570-571):

"This line (the east boundary of the Seminoles) in accordance with special instructions, was run so far east of the Creek Dividing Line as to include an area of 175,000 acres. But the one hundred seventy-five thousand acres do not embrace all the lands now occupied by the Seminoles. Some valuable property remains east of the east boundary, such as the store and post office at We-wo-ka, the We-wo-ka mission; the store and post office at Arleka and several homesteads of the Indians. As near as I can estimate, not having a positive knowledge, it will take about twenty-five thousand acres more or less to include all the property of the Seminole Indians, which now remains east of the east boundary, as surveyed by me, under my contract of June 26, 1888."

Thus the respondent just partially corrected said errors.

It later developed that still another error was made by defendant. Due to an error in the survey of the east boundary of said 175,000-acre tract, in 1888, 176,198.99 acres were included in said tract, or an excess of 1,198.99 acres, for which the Creek Nation received no compensation. (See *Creek Nation v. United States*, 93 Ct. Cls. 561, 563.)³

In working out this offset claim against petitioner the lower court mixes up the acreage of the 200,000-acre Seminole tract with the acreage of the 175,000-acre Seminole tract, deducts an 11,550.94-acre shortage on the west side of the 200,000-acre tract from an excess of 2,397.71 acres purportedly received by the Seminoles in the 175,000-acre tract, and determined that the difference of 165,847.17 acres at \$1 an acre, or \$165,847.17, was a gratuity offset against petitioner. Clearly an excess of acreage in the 175,000-acre tract has no connection with a shortage of acreage in the 200,000-acre tract. Different treaty provisions and acts of Congress and principles of law, different lands and consequently different values are all involved, and we submit that such an attempted settlement is most improper.

The sole question is whether respondent is entitled to a gratuity offset for the \$175,000 paid for 176,198.99 acres⁴ of lands purchased from the Creeks for the Seminoles under the circumstances outlined above. We have seen that the United States removed the Seminoles to what was believed to be their new national domain before the Creek "dividing line" was surveyed, and encouraged them to make improvements as rapidly as possible; then led them to be-

³ The lower court states that the Creek Nation was paid \$177,397.71 for 177,397.71 acres of lands included in the 175,000-acre purchase (R. 16). A mere reference to the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, shows that the Creek Nation received just \$175,000 for this land. Also in *Creek Nation v. United States*, 93 Ct. Cls. 561, 563, the Court found that the Creek Nation received no compensation for the excess of 1,198.99 acres included in this tract, and therein the Creek Nation was not permitted to recover compensation for this acreage.

⁴ See *Creek Nation v. United States*, 93 Ct. Cls. 561, 569, for these acreage figures.

lieve that the Rankin line was the correct dividing line, and promised them that if it were not correct, the United States would protect them in their improvements; and that in reliance upon these promises the Seminoles in good faith continued to make improvements on these lands. When the correct "dividing line" was established and it was determined that the United States had erroneously located the Seminoles on Creek lands, the Government made good its promise to the Seminoles in part only. We submit that under these circumstances said 175,000 was disbursed by respondent to correct its own errors, and to carry out its promises to the Seminoles, and therefore this amount would not be a gratuity offset against petitioner.

Furthermore, we believe that rather than being an element of gratuity this item is merely an element of reparation. The improvements which the Seminoles had made upon these lands were very valuable. In Sen. Ex. Doc. No. 126, 51st Cong., 1st Sess., p. 2, the Secretary of the Interior stated that the Seminoles had valuable improvements on this Creek land. On page 3 thereof the Commissioner of Indian Affairs stated that the Seminoles had "made for themselves homes and valuable improvements" on this land. On page 6 thereof the Seminole delegates state "The homes and improvements of the Seminoles are worth vastly more than the lands upon which they are situated will cost." On page 9 thereof Assistant Attorney-General, Geo. H. Shields, stated that "nearly all of the extensive improvements made by the Seminoles since their settlement on the land, * * * and also the agency buildings," were on this Creek land. In Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 6, Acting Commissioner of Indian Affairs, Thos. M. Nichol, stated that since the fall of 1866 the Seminoles had "made for themselves homes and very valuable improvements" on these lands.

We submit that in the absence of proof to the contrary the record outlined above clearly shows that the improvements made by the Seminoles from the time of their location on these Creek lands (1866) to 1871, would far exceed

the \$1.00 per acre paid by the United States for these Creek lands. Therefore, no element of gratuity is present, but that the United States merely made reparation for its own error in locating the Seminoles on wrong land. In other words, the Government took the easiest and least expensive way to rectify its error, for it would have cost the United States more to pay the Seminoles for their improvements and move them on their own lands, than to purchase the lands for the Seminoles, as was done.

We submit that respondent is not entitled to a gratuity offset for the amount of \$165,847.17, or any other amount, under the circumstances outlined above.

Findings 11-18 (R. 17-20)

The contention of the petitioner under this phase of the case is that defendant has the burden of proving affirmatively that amounts claimed as gratuity offsets under the act of August 12, 1935, c. 508, 49 Stat. 571, 596, were disbursed by the United States *gratuitously* and for the *benefit* of the Seminole Nation, before the United States is entitled to such offsets.

Said Act of August 12, 1935 provides in part as follows:

"Sec. 2. In all suits now pending in the Court of Claims by an Indian Tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * * Provided, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; * * * Provided further, That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *

This act requires the respondent to show affirmatively that the amounts claimed were expended "*gratuitously*" for the "*benefit of the said tribe or band*", before the Court

is authorized to offset *gratuities* against the *legal and equitable claims* of petitioner. As offset claims are affirmative claims, the burden of proof is upon the party asserting them.

In the lower Court the respondent relied solely upon a supplemental report of the General Accounting Office, showing disbursements made under general appropriations for the Five Civilized Tribes, to sustain its claim of gratuity offsets; it merely cited this report, and without further proof or argument claimed many of the disbursements set forth therein as gratuity offsets. There was no affirmative showing that the moneys shown in said report to have been disbursed were actually disbursed *gratuitously* or for the *benefit* of the Seminole Nation. While this report is evidence of the fact that said amounts were disbursed for the items set forth therein, yet this report, standing alone, does not support a claim for gratuity offsets against the Seminole Nation. This report merely sets forth an accurate and unbiased account of moneys disbursed by the United States which might have any connection with the affairs of the Seminole Nation and the other Five Civilized Tribes, upon which the Court may or may not, from the further evidence submitted, determine whether the amount spent by the United States for a particular item of disbursement would be a proper offset against the Seminole Nation.

The lower court allowed the items of offset against petitioner upon mere citation to said supplemental report, without further proof or argument in support of them (R. 17-20). Let us emphasize the fact that this supplemental report⁵ is *not of itself conclusive evidence* that a disbursement shown therein would be a gratuity offset. Before such items of disbursement are properly allowable as gratuity offsets, reference would have to be had to the act of Congress making the appropriation, and the purpose for which the dis-

⁵ The lower court cites what it calls "Gratuity Report" in support of these allowances. The G. A. O. Supplemental report is not so labeled. The letter of the Acting Comptroller General, transmitting this report, refrains from giving it such a title. (See p. 51 herein).

bursement was made. Although an appropriation *title* might not refer to a particular treaty obligation of the United States, yet the disbursement therefrom may be for a definite treaty purpose, and clearly the mere title of an appropriation would not be controlling. The actual purpose for which the disbursement was made would be controlling, and would have to be considered in order properly to determine whether or not an item of disbursement was a gratuity offset.

In the letter, dated September 4, 1936, from the Acting Comptroller General to the Attorney General, transmitting this report, it is stated as follows (R. 51):

"In accordance with your request there is transmitted herewith a report, in duplicate, of disbursements made by the United States for the benefit of the plaintiffs under other than treaty appropriations, during the period from July 1, 1857, to June 30, 1934. There is also incorporated in this report detail of disbursements under appropriations made for the administration of the affairs of the Five Civilized Tribes, referred to on pages 233 to 235 of the report of this office on Seminole Petition No. L-51, forwarded to you on September 29, 1933, together with a complete list of appropriations under which the aforesaid disbursements were made."

Thus the Comptroller General points out that there is included in this supplemental report the *detail* of disbursements made under the appropriations for the administration of the affairs of the Five Civilized Tribes, the expense of which under the various agreements with these tribes was to be borne by the United States. (See Statement of Comptroller General, quoted herein on page 72).

In *Fain Grain Co. v. United States*, 68 Ct. Cls. 441, 445, the court, in considering the proof adequate to sustain a counterclaim advanced by the Government, said:

" * * * The remainder of defendant's counterclaim is not proved and in this connection perhaps counsel ought to be reminded that statements of accounts, as shown in the Government's books, records, or files, by

themselves and alone, are inadequate. The Government is not exempt from the rules of evidence that apply to other litigants. . . . "

In *Silberstein & Son v. United States*, 69 Ct. Cls. 373, 383, the court said:

" . . . The only proof offered in support of this claim is the statement rendered to the plaintiff May 9, 1925, by the Comptroller General (Finding XIV), in which this item is charged against the plaintiff. This is not sufficient to support the counterclaim. The rendering of this statement is no evidence whatever that the amount demanded was in fact due the defendant. It requires the same measure of proof to establish a counterclaim that is required in other claims. The defendant must prove its case by the introduction of satisfactory proof. This has not been done, and the counterclaim for \$125.95 for storage charges must be dismissed."

To the same effect is *Mohawk Condensed Milk Co. v. United States*, 70 Ct. Cls. 671.

Thus it is well settled that a mere statement of account from the Comptroller General, by itself without further proof, is insufficient proof of a counterclaim advanced by the Government.

We submit that the failure of the lower court to recognize this principle, and its failure to require of respondent further proof and argument as to whether or not a particular item of disbursement was a gratuity offset has resulted in the allowance as gratuity offsets of moneys disbursed by respondent to carry out its treaty and agreement obligations with petitioner, and in the allowance of gratuity offsets of amounts disbursed for the benefit of the individual instead of for the benefit of the "tribe or band."

The decision of the lower court now before us for consideration recognizes the principle that amounts disbursed by the United States to fulfill its treaty and agreement obligations with the Seminole Nation would not be gratuity offsets under the act of August 12, 1935 (R. 32). See also *Blackfeet*

Indians v. United States, 81 Ct. Cls. 101, 139-140; *Klamath Indians v. United States*, 85 Ct. Cls. 451, 460-461.

Also the lower court has heretofore recognized the principle that amounts disbursed for individual Indians would not be offsets against the tribe or band. In discussing this point in the *Osage* case, 66 Ct. Cls. 64, 82, the court said:

"It may, however, be well to state that, as to counterclaims, the special act directed considerations only to counterclaims against the Osage Tribe, and not against individuals of the Tribe."

While recognizing the above principles yet the lower court failed properly to apply them in the case at bar. With the above principles in mind let us analyze for the Court the items of gratuity offset allowed by the lower court, and charged against petitioner.

The findings of the lower court with respect to gratuity offsets may be divided into three separate periods:

1. Period from the fiscal year 1857 to 1866—Findings 11, 14 (R. 17-18).
2. Period from the fiscal years 1867 to 1898—Findings 12, 15, 17 (R. 17-19).
3. Period from the fiscal years 1899 to 1934—Findings 13, 16, 18 (R. 17-20).

Period from 1857 to 1898.

In Findings 11, 12, 14, 15 and 17, covering the period from 1857-1898, the amounts shown to have been disbursed either directly for petitioner or jointly with the other Five Civilized Tribes, were disbursed chiefly for *administrative expenses of the United States incurred in fulfilling its treaty obligations with the petitioner.*

The main purposes for which the amounts were disbursed are expenses incurred in maintaining the United States agency in the Seminole Nation, and these items are listed as

follows: Agency buildings and repairs; Fuel, light and water; Miscellaneous Agency expenses; Pay of Indian Agents; Pay of Interpreters; Transportation, etc. of supplies; Pay of miscellaneous employees; Annuity expenses; General Office expense; Hardware, glass, oil and paints; Pay and expenses of Indian Police and Pay of skilled employees.

As the lower court pointed out in its decision of January 6, 1941, petitioner, plaintiff below, contended that all of the above expenses were incurred by the United States in fulfilling its treaty obligations with petitioner (R. 34). Let us outline briefly the treaty provisions under which these obligations of the United States arose.

The treaty of August 7, 1790 (7 Stat. 35) with the "Upper, Middle and Lower Creeks and Seminoles composing the Creek nation of Indians" (Art. I), provided in part as follows:

"Article XII. That the Creek nation may be led to a greater degree of civilization, and to become herdsman and cultivators; instead of remaining in a state of hunters, the United States will from time to time furnish *gratuitously* the said nation with useful domestic animals and implements of husbandry. And further to assist the said nation in so desirable a pursuit, and at the same time to establish a certain mode of communication, *the United States will send such, and so many persons to reside in said nation as they may judge proper, and not exceeding four in number, who shall qualify themselves to act as interpreters.* These persons shall have lands assigned them by the Creeks for cultivation, for themselves and *their successors in office*; but they shall be precluded ~~exercising~~ any kind of traffic." (Italics ours)

The treaty of September 18, 1823 (7 Stat. 224), with the Seminoles alone, provided in part as follows:

"Article. III. The United States will take the Florida Indians under their care and patronage, and will afford them *protection* against all persons whatsoever; * * *

"Article VI. *An agent, sub-agent, and interpreter, shall be appointed to reside within the Indian boundary aforesaid, to watch over the interests of said tribes;*" (Italics ours)

The Creek and Seminole treaty of August 7, 1856 (11 Stat. 699), provided in part as follows:

"Article 12. So soon as the Seminoles west shall have been removed to the new country herein provided for them, *the United States will then select a site and erect the necessary buildings for an agency, including a council-house for the Seminoles.*"

"Article 15. * * * All persons not being members of either tribe, found within their limits, *shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military;)* with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States; all persons peaceably travelling or temporarily sojourning in the country, or trading therein under license *from the proper authority of the United States;* and such persons as may be permitted by the Creeks or Seminoles, *with the assent of the proper authorities of the United States,* to reside within their respective limits without becoming members of either of said tribes." (Italics ours)

"Article 17. All persons licensed by the United States to trade with the Creeks or Seminoles shall be required to pay to the tribe within whose country they trade, a moderate annual compensation for the land and timber used by them, the amount of such compensation, in each case, to be assessed by the proper authorities of said tribe, subject to the approval of the *United States agent therefor.*

"Article 18. The United States shall *protect* the Creeks and Seminoles from domestic strife, from hostile invasion, and from aggression by other Indians and white persons not subject to their jurisdiction and laws:

"Article 19. The United States shall have the right to establish and maintain such military posts, military and postroads and *Indian agencies* as may be deemed necessary within the Creek and Seminole country. * * * Such persons only as are or may be in the employment of the United States, in any capacity, civil or military, or subject to the jurisdiction and laws of the Creeks and Seminoles, shall be permitted to farm or raise stock within the limits of any of said military posts or *Indian agencies*. * * *"

In addition to the above obligations of the United States under said Treaty of 1856, the United States agreed to pay the Seminoles west certain sums; to pay interest on funds established therein to be distributed per capita annually by the United States (Article 8); to remove the Seminoles in Florida to the west and provide them with rations and subsistence during their removal and for 12 months thereafter, and to distribute among them clothing, etc. (Art. 9); to pay delegations of Seminoles to Florida to induce those east to remove west (Art. 10); and to survey the boundaries of the reservation (Art. 21).

Other like obligations were assumed by the United States under the Treaty of March 21, 1866, 14 Stat. 755. In Article 1 the "United States guaranteed to the Seminoles quiet possession of their country"; Article 3 provided that the United States purchase and distribute certain goods to the Seminoles; and thereunder the United States also was required to pay interest at 5 per cent per annum on a seventy thousand dollar fund, said interest to be applied annually to the support of schools and to the Seminole government; to expend \$43,362 for subsisting said Indians; to distribute \$50,000 in awards to the Seminoles; to erect a mill; to provide for the payment of claims of Loyal Seminoles and to appoint commissioners to investigate said claims and pay their expenses (Art. 4); to erect agency buildings (Art. 6); and to provide for a general council of tribes within the Indian Territory, and to pay the expenses of same (Art. 7).

Thus, from the above-quoted treaty provisions, running as far back as 1790, it was not only the custom but a treaty

requirement that respondent furnish an agent, sub-agent and interpreter for the petitioner. It is evident also that it would have been impossible for the United States to fulfill its treaty obligations with the petitioner unless these disbursements were made. This service was promised the Seminoles for a given consideration on their part, and the Government was required to disburse this money to fulfill these treaty duties. Therefore, the amounts disbursed by respondent for maintaining its agency within the Seminole Nation clearly would not be gratuity offsets, but would be disbursements of the United States made incidental to the carrying out of its treaty obligations with petitioner.

Let us comment more particularly upon one of the above treaty obligations owing to petitioner. Article 15 of the Treaty of August 7, 1856, 11 Stat. 699, provided in part as follows:

"* * * all persons not being members of either tribe, found within their limits, shall be considered intruders, and be removed from and kept out of the same by the United States agents for said tribes, respectively; (assisted, if necessary, by the military); with the following exceptions, viz: such individuals with their families as may be in the employment of the Government of the United States;" etc.

Article 1 of the Treaty of March 21, 1866, 14 Stat. 755, provides:

"* * * In return for these pledges of peace and friendship, the United States guarantees them quiet possession of their country; and protection against hostilities on the part of other tribes; * * * Therefore the Seminoles agree to a military occupation of their country at the option and expense of the United States."

Thus, in one treaty, the United States assumed an obligation that its agent would remove all intruders within the limits of the Seminole country, and in the other treaty the United States guaranteed to the Seminoles quiet possession of their country.

There was ample reason for these provisions. The Five Civilized Tribes had been driven from their homes east of the Mississippi by the inroads of the whites. The United States had removed them to lands west of the Mississippi and had agreed to isolate them from the white man. However, with the development of our country westward the white men settled the surrounding states and territories, and soon began again to intrude upon their western domains.

Soon after the Treaty of Mar. 21, 1866 was executed, in 1869, the United States Agent for the Seminoles reported to the Commissioner of Indian Affairs (1869 Rept. Comr. Ind. Aff., p. 418), as follows:

"Already the attention of the people of Kansas on the north, of Missouri on the east, and of Arkansas and Texas on the south and west, is turned to the broad prairies, the fertile valleys, and wooded hills of the Indian Territory. Their longing eyes are bent on the possession of the last fairest portion of the uninhabited region of the United States. While civilization is crowding on its borders, its rich agricultural, splendid climate, and inexhaustible coal and mineral resources are awaiting the development of a higher civilization. What shall be done with the Indian? The recent success of settlers upon Indian lands has emboldened the squatter, and he sees that he has only to go on these lands, make a claim, and plenty of demagogues are found to raise the cry of lands for the landless; and homes for the homeless; and the rights of the settlers find willing advocates on the floor of Congress, in the press, and on the stump * * *"

In 1876 the United States Indian Agent wrote the Commissioner of Indian Affairs as follows (1876 Rept. Comr. Ind. Aff., p. 63):

"Another great source of continued disturbance is the large number of unauthorized and irresponsible white intruders in the Territory. Vigorous measures ought at once to be adopted to carry into effect those treaty stipulations which guarantee to keep these na-

tions free from persons not duly authorized by law to reside therein. Their number is constantly on the increase; in one county alone in the Chickasaw Nation it is estimated that there are three thousand." (Italics ours)

The duties of the United States Indian Agent for the Five Civilized Tribes agency, were outlined in his report to the Commissioner of Indian Affairs (1877 Rept. Comr. Ind. Aff., p. 107), as follows:

"My work has not been to protect these tribes from cold and hunger by furnishing them with clothing and food—these are not supplied by the United States Government—as much as it has been to *protect them in their treaty rights*, against the impositions and craftiness of dishonest white men. I would not intimate by this remark that there are no real good and honest white men among these tribes. There are very many, but those who are unscrupulous, selfish, unprincipled and indolent far outnumber them. And while the good and honest white people living here are slow to speak and act against the sins of the country, the latter are bold and reckless in their deeds of corruption; in fact, they control, to a large extent, the political and financial interests of the tribes; and the crimes charged upon the Indians in too many cases may be traced either directly to the influence or acts of corrupt, designing white men * * * (Italics ours).

The intruders continued to pour into the Indian Territory, and in commenting upon organized efforts of settlers to invade the lands of the Five Civilized Tribes; United States Agent Tufts, in 1881, states as follows (1881 Rept. Comr. Ind. Aff., p. 104):

"* * * The prompt arrest and conviction of 'Captain' Payne by the United States authority, have convinced these people, more than anything that has been done for years, *that the United States intends to protect their rights and to carry out in good faith the provisions of the treaty.*" (Italics ours)

In endeavoring to carry out this treaty obligation—to remove intruders—an Indian Police force was organized, and used for this purpose (1883 Rept. Comr. Ind. Aff., p. 88). The United States Agent reported (1889 Rept. Comr. Ind. Aff., p. 210):

“Since I have been in charge of the agency the police have served effectively in removing intruders, suppressing crime, preserving peace, arresting criminals, guarding Government funds, and in many ways performing arduous and oftentimes dangerous duties * * *”

In 1885, United States Agent, Robert L. Owen (who later became U. S. Senator), reported (1885 Rept. Comr. Ind. Aff., p. 107):

“The United States agent is kept busy trying to determine who are intruders, of the great number reported to the agency as such; then putting them out the limits of the agency; and, lastly, keeping them out with a United States Indian police force * * *. The United States is available for this purpose, but it is like using a sledge-hammer to fan away the flies with—strong enough to crush the fly, but not nicely adjusted to the business.”

Thus we have outlined the duties of the United States Agent and it is evident that his efforts were chiefly confined to directing the work protecting these tribes from white intruders, and attempting to remove them in fulfillment of the Government's treaty obligations with these tribes.

In denying the petitioner's contention—that these disbursements were treaty disbursements of the United States, and not gratuity offsets—the lower Court stated (R. 34):

“However persuasive this argument may once have been, this question has heretofore been decided adversely to the plaintiff by the cases of Blackfeet, et al, Tribes v. United States, 81 Ct. Cls. 101, 137, and Shoshone Tribe v. United States, 82 Ct. Cls. 23, 93. We hold accordingly that the defendant is entitled to these offsets.”

An examination of these cases shows that they have no application to the question now before us. These cases involved what is known as the "Wild Tribes", the treaties with which are separate and distinct from those of the Five Civilized Tribes. The question before the court in these cases was whether the administrative expenses were beneficial to the Indians, not whether these disbursements were incurred in the performance of the treaty obligations of the United States owing to the tribe. In the *Blackfeet* case, 81 Ct. Cls. 101, 137, the court said:

"It is contended by plaintiffs that these disbursements were made for the general administrative expenses of the Indian Service of the United States, and that the record does not show that the plaintiffs, as tribes, received any benefit from such expenditures, or, even if it be assumed that they did, to what extent. *They were expenditures which the United States was under no legal obligation to make for, or in behalf of, the plaintiffs.* They were unqualified gratuities, and, as such, under the plain provisions of the jurisdictional act, are properly chargeable against the plaintiffs as set-offs against the amounts they are entitled to recover." (Italics ours.)

The court in the *Shoshone* case, 82 Ct. Cls. 23, 93, merely quoted with approval the above language in the *Blackfeet* case.

In the case at bar the question now under discussion is not one of *benefit*; but the question is whether the United States was *required* to maintain said agency in order that the duties and obligations assumed by it under the Treaties of 1856 and 1866 could be fulfilled. Clearly ~~said~~ administrative expenses as to the Seminole Nation were incurred by the United States in fulfilling these treaty obligations, and would not be gratuity offsets against petitioner. Nevertheless the lower court charged said expenses to the petitioner.

We submit that the lower court erred in this holding, and we request this court to correct the error.

"General Office Expense"

Disbursements for the item of "General Office Expense" were made from the appropriation "Commission, Five Civilized Tribes" (R. 71), and were for the expenses of the Dawes Commission. This commission was created by Section 16 of the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, to negotiate with the Five Civilized Tribes for the extinguishment of their tribal governments and the allotment of their lands in severalty "to enable the ultimate creation of a State or States of the Union which shall embrace the lands within said Indian Territory."

Under the then existing treaties these tribes had been guaranteed the right of self-government and complete isolation from the whites, and the United States further agreed that before a State or territory could properly be created out of their national domains, the consent of these tribes must be obtained (Creek and Seminole treaty of August 7, 1856, Arts. 4; 15; 11 Stat. 699). As we have seen, the United States utterly failed to fulfill its obligations to remove white intruders, and to carry out its policy of isolating these tribes.

As is stated by the Dawes Commission in its report of November 20, 1894 (Repts. Comm. F. C. T., H. Ex. Doc. No. 1, Pt. 5, 53rd Cong. 3rd Sess., p. LXVII, Cong. Ser. 3305):

"The barrier opposed at all times by those in authority in the tribes, and assuming to speak for them as to any change in existing conditions, is what they claim to be 'the treaty situation.' They mean by this term that the United States is under treaty obligations not to interfere in their internal policy, but has guaranteed to them self-government and absolute exclusion of white citizens from any abode among them; that the United States is bound to isolate them absolutely. It can not be doubted that this was substantially the original governing idea in establishing the Five Tribes in the Indian Territory, more or less clearly expressed in the treaties, which are the basis of whatever title and authority they at present have in the possession of that Territory, over which they now claim this exclusive jurisdiction. To

that end the United States, in different treaties and patents executed in pursuance of such treaties, conveyed to the several tribes the country originally known as the 'Indian Territory,' of which their present possessions are a part only, and agreed to the establishment of them therein of governments of their own. The United States also agreed to exclude all white persons from their borders.

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"For quite a number of years after the institution of this project it seemed successful, and the Indians under it made favorable advance toward its realization. But within the last few years all the conditions under which it was inaugurated, have undergone so complete a change that it has become no longer possible. It is hardly necessary to call attention to the contrast between the present conditions surrounding this Territory and those under which it was set apart. Large and populous States of the Union are now on all sides of it, and one-half of it has been constituted a Territory of the United States. These States and this Territory are teeming with population and increasing in numbers at a marvelous rate. The resources of the Territory itself have been developed to such a degree and are of such immense and tempting value that they are attracting to it an irresistible pressure from enterprising citizens. The executory conditions contained in the treaties have become impossible of execution. It is no longer possible for the United States to keep its citizens out of the Territory. * * *"

With the Indian country overrun with white intruders, the United States abandoned its policy of isolating these Five Civilized Tribes, and created the Dawes Commission to negotiate with them to free the United States from the requirements of its treaties with these tribes, which it had failed to perform; and to secure agreements with the tribes authorizing a transformation from the tribal estate, held in common, to individual estates, with title in the individual Indians, with the ultimate end in view of incorporating this Territory into a new State of the Union—a purpose clearly beneficial to the United States, and in furthering its change of policy with respect to these tribes.

These negotiations were carried on by the Dawes Commission over a period of years during which time the Five Civilized Tribes refused to consider the proposed change. The item "General Office Expense" covers the expense of the Dawes Commission during the period of these negotiations. Clearly this expense is not chargeable to the Five Civilized Tribes, who vigorously opposed this change, and only after the coercive provisions of the Curtis Act were they subdued and forced to accept the Government's proposals.

Therefore, this item of expense was incurred by the United States in securing the release from its former treaty obligations with these tribes, and in furthering *its change of policy toward them*. We submit that the lower court erred in charging any part of this item as a gratuity offset against petitioner.

Period from 1899 to 1934 (R. 17-20)

The lower court erred in charging the Seminole Nation as gratuity offsets with amounts disbursed by the United States in fulfilling its obligations under the Seminole agreements, ratified by Act of July 1, 1898, c. 542, 30 Stat. 567, and by Act of June 2, 1900, c. 610, 31 Stat. 250.

We will endeavor to show the court that very little, if any, of the disbursements set forth in Findings 13 and 18 (R. 17-20) are gratuities chargeable to plaintiff, or the Five Civilized Tribes generally, under said Act of August 12, 1935.

The agreements executed by the Dawes Commission with the Five Civilized Tribes provided generally for the extinguishment of the tribal title to their lands and the transformation of them into *individual estates*, the sale of the unallotted lands and townsites, the per capita payment of the proceeds of said sales and of the other tribal funds, or the equalization of allotments, and for the protection of the individual allottees in the possession of their individual allotments. The United States realized that it must protect the individual allottees from the great number of "grafters"

within their territory, and these agreements, provided restrictions upon the alienation of allotments for a number of years, and the leasing of their lands, etc., under the supervision and with the approval of the Secretary of the Interior.

To understand properly the ultimate terms of the Seminole-Agreement, let us review briefly its background. When the Dawes Commission first began its negotiations with the Five Civilized Tribes, it made certain proposals to the Seminoles to be used as a basis for the proposed agreement. These proposals are listed in the Dawes Commission's Report of November 20, 1894 (Repts. Comm. to F. C. T., H. Ex. Doc. No. 1, Pt. 5, 53rd Cong. 3rd Sess., p. LXIV-LXV, Cong. Ser. 3305) as follows:

“Propositions to the Seminoles.

“The Commission to the Five Civilized Tribes, appointed by the President under Section 16 of an act of Congress, approved March 3, 1893, propose to treat with the Seminole Nation on the general lines indicated below, to be modified as may be deemed wise by both parties after discussion and conference.

“First. To divide all lands now owned by the Seminole Nation, not including townsites, among all citizens according to the treaties now in force, reserving town sites, coal and minerals, for sale under special agreement. Sufficient land for a good home for each citizen to be inalienable for twenty-five years, or such longer period as may be agreed upon.

“Second. *The United States to agree to put each allottee in possession of the lands allotted to him without expense to the allottee*—that is; to remove from the allottee's land all persons who have no written authority to be on the same, executed by the allottee after the date of the evidence of title.

“Third. Town sites, and coal and mineral discovered before allotment,—to be the subjects of special agreements between the parties—such as will secure to the nation and to those who have invested in them a just

protection and adjustment of the respective rights and interests therein.

"Fourth. A final settlement of all claims against the United States. .

"Fifth. All invested funds, not devoted to school purposes, and all moneys derived from the sale of town-sites, coal and minerals, as well as all moneys found due from the United States, to be divided per capita among the citizens according to their respective rights under the treaties and agreements.

"Sixth. All moneys due the citizens of said nation, except that devoted to school purposes, to be paid per capita to the citizens entitled thereto by an officer of the United States, to be appointed by the President."

"Seventh. If an agreement shall be reached with the Seminole Nation a Territorial government may be formed by Congress and established over the territory of the Seminole Nation and such other of the Five Civilized Tribes as may have at the time agreed to allotment of lands and change of government.

"Eighth. Such agreements when made shall be submitted for ratification to the Seminole government, and, if ratified by it, shall then be submitted to Congress for approval.

"Ninth. The present tribal government to continue in existence until after the lands are allotted and the allottee put in possession, each of his own land, after which a territorial government may be established by Congress."

The Original Seminole Agreement as finally executed provided generally that the United States appraise and classify the Seminole lands, and divide and allot them equally among the members of the tribe, under direction and supervision of the Dawes Commission; that leases of mineral lands be approved by the Secretary of the Interior; that the United States take over and administer the Seminole school fund; that the homesteads of allottees be inalienable in perpetuity; that all Seminole moneys, after equalizing allotments, except the school fund, shall be paid per capita

by an officer of the United States appointed by the Secretary of the Interior.

The Supplemental Seminole Agreement, approved by Act of June 2, 1900, c. 610, 31 Stat. 250, provided for the making of rolls upon which the distribution of Seminole property should be made; and provided for the manner in which the lands and funds belonging to allottees should descend to heirs upon the death of the allottees.

Thus in consideration of the Seminoles' agreeing to give up their former mode of life and to give up their tribal holdings and to adopt the ways of the white man; the United States agreed to divide their tribal estate among the members of the tribe, and to perform the other obligations outlined in these Agreements.

Let us point out to the Court that one of the general inducements held out by the Dawes Commission to secure the agreements with the Five Civilized Tribes was that if these tribes would agree to individualize their tribal holdings and accept the Government's new policy with respect to them, the United States would pay the expense of the administration. Section 34 of the Original Creek Agreement, approved by Act of March 1, 1901, c. 676, 31 Stat. 861, 871, provided in part as follows:

"The United States shall pay all expenses incident to the survey, platting, and disposition of town lots, and of allotments of lands made under the provisions of this agreement, * * *"

The agreements with the Choctaws and Chickasaws (Atoka Agreement, approved by Act of June 28, 1898, c. 517, 30 Stat. 495, 505, 509) and Cherokees (Cherokee Agreement, Sec. 50, approved by Act of July 1, 1902, c. 1375, 32 Stat. 716, 724) also contained similar provisions.

The lower court, in holding that the petitioner was chargeable with the expenses incurred by the United States in carrying out its agreement obligations with petitioner, stated (R. 36):

"There was no express provision in the Seminole agreement that the United States should bear the expense of the allotment of the Seminole lands, and the majority of the Court is of the opinion that an obligation to do so cannot be implied. *Choctaw Nation v. United States*, 91 Ct. Cls. 320."

Although no such express provision is contained in the Seminole Agreement requiring the United States to bear the expense of the distribution of the Seminole tribal estate, yet a reference to the above mentioned "Proposals to the Seminoles" made by the Dawes Commission to induce them to execute the agreement shows what obligations the United States would assume should said agreement be made. In consideration of the Seminoles' agreeing to give up their tribal holdings in lands, money, etc., the United States agreed to divide this tribal estate among the members of the tribe in accordance with the terms of said agreement, etc.

We submit that the lower court should have applied the well settled rule set forth in 6 Ruling Case Law, p. 856, as follows:

"One who undertakes to accomplish a certain result agrees by implication to supply all the means necessary thereto. He is bound by implication to do everything necessary to enable him to perform his contract. If the giving of notice is requisite to the proper execution of a contract, a promise to give such notice will be inferred. In fact, it may be said that contracts impose on parties, not merely obligations expressed in them, but everything which, by law, equity, and custom, is considered incidental to the particular contract, or necessary to carry it into effect. * * *

See also Vol. 3, Williston on Contracts, Sec. 1293; *Hall v. Luckman*, 107 N. W. 932, 933; *John O'Brien Lumber Co. v. Wilkinson*, 94 N. W. 337, 338. The above principle is applied in disputes between parties of equal standing, and it should have been applied by the lower court with even greater particularity in this case, especially in view of the rule laid down by this Court in numerous cases that Indian treaties

and agreements are to be construed liberally in favor of our dependent Indian wards. (*Choate v. Trapp*, 224 U. S. 665, 675; *Jones v. Meehan*, 176 U. S. 1, 11).

In the American Law Institute Restatement of the Law on Contracts, Sec. 230, p. 310, it is stated:

"The standard of interpretation of an integration, except where it produces an ambiguous result, or is excluded by a rule of law establishing a definite meaning, is the meaning that would be attached to the integration by a reasonably intelligent person acquainted with all operative usages and knowing all the circumstances prior to and contemporaneous with the making of the integration, other than oral statements by the parties of what they intended it to mean."

Under the circumstances surrounding the execution of these agreements with the Five Civilized Tribes, and in view of the propositions made to them by the Dawes Commission as to the obligations that the United States would assume under them, would it not be unreasonable to say that the United States would be excused from allotting the lands and dividing these estates because of the failure of these tribes to bear this expense? Would it be reasonable to assume that these tribes would have executed these agreements if they had understood that they would be required to pay the expense of carrying out the Government's new policy which had been forced upon them?

We believe that Hon. W. W. Hastings—a Cherokee himself, tribal attorney for that tribe, and for years a member of Congress—fairly sums up this whole situation, as follows (Hearings, H. Comm. Ind. Aff., 66th Cong., 1st Sess., on Sept. 26, 1919, pp. 249-252):

"Mr. Hastings. Let me inject a word. In the early part of 1830 and between 1830 and 1840 the Five Civilized Tribes were practically coerced into making treaties with the Government by which they were removed from comfortable homes and civilized surroundings in the eastern States to what was afterwards known as the Indian Territory. The Government, by various treaties

with these tribes, agreed to protect them and promised in those treaties that they should hold those lands forever in their tribal capacity. Subsequent treaties were made confirming these prior treaties.

"By the act of March 3, 1893, 26 years ago, the Government after finding that the Indian Territory was surrounded, railroads run through the country, cities and towns had grown up, thousands and thousands of white men had gone in there, some in towns and some as tenants, sent what is known as the Dawes Commission down to negotiate with the Five Civilized Tribes to induce them, if possible, to give up their tribal government and become citizens of the United States and to become ultimately a State of the Union. The Dawes Commission had very great difficulty in negotiating these agreements. I hesitate to put it into the record, but it is the truth that they, in a measure, coerced them into making those agreements. The Cherokees never made one. They did make one in 1899. They ratified it; the Government here did not. But by means of certain coercive legislation on behalf of Congress, they were compelled to accept an act of Congress approved July 1, 1902, because it was an alternative either to accept that legislation or to go under other legislation that had been enacted by the Congress that was exceptionally objectionable to the tribe.

"Under those circumstances, either agreements negotiated with the tribes, or acts of Congress enacted, and submitted to the tribes, which they accepted, and it amounted legally to the same thing this legislation provided for making rolls on behalf of the Government, survey of lands and individualization of lands, and winding up of their estate; in other words, giving to each member of the tribe the portion that was due him.

"Since these agreements were negotiated with the representatives of the Government, first, the Dawes Commission, and later others have been doing this work under those various agreements. * * * Of course, the Government of the United States had to put some terms there favorable to the Indians to get them to accept them, and among others, they agreed to bear this expense and are bearing the expense of administration in this work.

"Mr. Elston. Is that by implication or agreement?

"Mr. Hastings. It is by agreement with these tribes that they shall do these things. Let me proceed and let Mr. Meritt correct me if I am in error. This has been my life work. Every one of these agreements contains an exemption from taxation to a certain extent. I am not so familiar with all the tribes; generally speaking, restricted land is exempt from taxation, and in addition to that, the homestead of a Cherokee Indian is exempted as long as he holds it. The homestead of the Seminole is exempted in perpetuity. The homestead of the Creek is exempted for 21 years, as I recall.

"There have been many court decisions. These exemptions have led to litigation and to interpretations placed upon these provisions. Congress in 1908 tried to tax all these lands. The Indians resisted it under those agreements. It was brought to the Supreme Court of the United States and the Supreme Court declared that act unconstitutional. So the counties can not levy taxes. Our State can not, if it wants to. Why? Your Federal Government made it impossible, and therefore in some of those communities great areas of lands are not taxable, and neither township, county, or State can collect a cent of taxes.

" . . . All this legislation put together shows the way this Government is under obligation to spend the money. It is a large sum of money.

"The affairs of the Seminoles are about wound up. They have two boarding schools. One of them is in litigation; a white man bought part of the land, and it has been in litigation. The affairs of the Seminoles ought to be wound up in the next two years, except in none of these three tribes will the restricted Indian be turned loose from the supervision of the Government until 1931, the time determined by Congress."

It has been the understanding of all branches of the Government that, under these agreements with the Five Civilized Tribes, the United States was to bear the expense of the administration of these estates and the division of them into individual holdings; and that as long as the individual In-

dians were restricted these agreements require the United States to protect them in their individual holdings. In harmony with this universal understanding is the statement contained in the General Accounting Office Report, which is as follows (R. 70):

"Pursuant to the aforesaid act (March 3, 1893), commissioners were appointed, who entered into separate agreements with the aforesaid nations of Indians, including the Seminole Nation. Said agreements provided generally that the United States should bear the expense of the administration or division of the tribal estates, which involved the allotment of lands in severalty; the survey, appraisalment, and sale of certain lands; the survey and sale of town sites; and the leasing of certain mineral and oil lands. In carrying out said projects, there were also considerable expenses incurred by the United States in the removal of objectionable persons from allotments; the removal of restrictions upon the alienation of lands of certain allottees; the investigation of leases fraudulently obtained; and other expenses, including the pay of commissioners, superintendents, inspectors, attorneys, and miscellaneous employees."

With this background before us let us now direct the Court's attention to the findings of the lower court with respect to gratuity offsets. In examining the items of disbursement let us keep in mind that under the agreements with the Five Civilized Tribes the general duties of the United States were two fold: that of dividing the tribal estate among the members of the respective tribes—individualizing them; and that of protecting the individual Indian in his individual estate during the period of restrictions.

Finding 13

In Finding 13 of the lower court are set forth all the items of disbursement made directly for the Seminole Nation. However, it is obvious that the following items of disbursement were made directly for, and necessarily incidental to, the carrying out of the obligations of the United States with

the Seminole Nation and therefore would not be gratuity offsets:

Appraising, Enrolling, General Office Expenses, Miscellaneous agency expenses, Pay miscellaneous employees, Pay capita payment expenses, Preservation of records, Probate expenses, Protecting property interests, Sale of townsites, Surveying, Surveying and allotting, Traveling expenses.

As to the other items included in this finding there was no affirmative showing that they were proper charges against the Seminole Nation. These items are listed as follows: Clothing, Expenses of delegates, Livestock, Medical attention, Provisions and other rations. These disbursements were made after the tribal lands were allotted, and when practically all the other tribal property was individualized. Most of the restrictions had been removed, and the remaining obligations of the United States were owing to a small class of individual Indians, known as restricted Indians. Therefore, unless they are shown definitely to have been disbursed for the Seminole Nation generally, they would not be proper offsets against the tribe, but would be chargeable to the individual estates of restricted Indians.

The amount of \$20,377.89 disbursed for the item of "Education" was disallowed by the lower court as not a proper charge against the petitioner, after we had pointed out that such disbursements were not made for the benefit of the Seminole Nation, but were made for the benefit of whites and negroes (R. 18, 37, 41-42). Thus no question arises as to this item. However, it clearly demonstrates the real nature of the claim of respondent for gratuity offsets.

Finding 18

This finding of the lower court sets up as gratuity offsets all amounts disbursed by the United States from 1899 to 1934, in fulfilling its obligations under agreements with all of the Five Civilized Tribes, and a percentage was charged against the Seminole Nation without proof or argument in support of such charge. Let us keep in mind also that the

appropriations from which these disbursements were obtained were culled for amounts directly chargeable to the Seminole Nation which were set up separately in finding 13, heretofore discussed, and that the amounts set up in finding 18 are balances disbursed from said appropriations which respondent could not prove were disbursed for the Seminole Nation.

Although the Seminole Nation had its own domain, separate and distinct from the other Five Civilized Tribes, and was the smallest tribe, and the administration and distribution of its tribal estate was free from complications, yet the lower court charged it with a percentage of all moneys spent in administering and distributing the vast estates of the other Five Civilized Tribes; this, in the face of the statement in finding 19 that "what portion of the expenditures set out in findings 17 and 18 were spent for the benefit of the Seminole Nation does not appear by the proof." (R. 20.)

Certainly any charge made against the Seminole Nation on this basis would be most unfair to petitioner, for no proof was adduced to support such a charge. Nevertheless the lower court arbitrarily charged petitioner with 3.72 per cent of this total.

We have heretofore reviewed generally the obligations of the United States under the agreements with the Five Civilized Tribes, and have shown the Court that as an inducement to these tribes to agree to divide their tribal estates and individualize their holdings, the United States agreed to pay the expense of administration. Also we have shown that under these agreements the general duties of the United States were two-fold: first, the duty of administering the estates and individualizing them without charge to the tribes or the individual allottees; and second, the duty of protecting the individual allottees in the possession of their individual estates for the period of restrictions, and supervising the leasing of their lands for various purposes. Practically all of the items of disbursements set forth in finding 18 were for the purpose of carrying out

these agreement obligations of the United States with these tribes, and therefore would not be gratuity offsets.

The following items were either directly or incidentally disbursed under these agreements:

Allotting; appraising; appraising and selling lands; appraisal and sale of restricted lands; automobiles and repairs; copying allotment records; equalization of allotments expenses; examining records in disputed citizenship cases; feed and care of the horses; fuel, light and water; general office expenses; household equipment; incidental expenses; investigating leases; leasing of mineral and other lands; miscellaneous agency expenses, oil and gas expense, oil and gas mining supervision; allotted lands; pay and expenses of Indian police; pay of Indian agents; pay of clerks; pay of Indian inspectors; pay of interpreters; pay of miscellaneous employees; pay of superintendents; per capita payment expenses; preservation of records; protecting property interest of restricted members; provisions and other rations; purchase of horses; removal of alienation restrictions; sale of allotted lands; sale of restricted lands; sale of townlots; sale of townsites; sale of unallotted lands; surveying; surveying and allotting; surveying segregated coal and asphalt lands; surveying, sale, etc., of lands; timber estimating; transportation, etc., of supplies; and traveling expenses.

Many of the items set forth in finding 18, and allowed by the lower court as gratuity offsets, could not possibly be charges against the Seminole Nation, unless the United States can show affirmatively that they were a *gratuity* and further that they were *beneficial to said tribe*. For instance, the Seminole Nation had just one townsite which was disposed of under the terms of the Seminole Agreement by the tribal officials, at no expense to the United States (*Seminole Nation v. United States*, 92 Ct. Cls. 210). Yet the Seminole Nation is charged with "Sale of townlots" and "Sale of town sites", and other incidental expenses connected therewith, such as General Office Ex-

penses, Pay of Miscellaneous Employees, etc., incurred in disposing of the townsites of the other Five Civilized Tribes (R. 20). Although within the Seminole Nation there was no coal or asphalt, yet it is charged with a part of "Surveying segregated coal and asphalt lands", etc., and other expenses properly chargeable solely to the Choctaw and Chickasaw Nations (R. 20). See Atoka Agreement of the Choctaw and Chickasaw Nations, approved by Act of June 28, 1898, c. 517, 30 Stat. 495, 505, 510; also the Supplemental Agreement, approved by Act of July 1, 1902, c. 1362, 32 Stat. 641, 653-655 (Secs. 56-63).

"Education"

Although the amount of \$1,693,525.90 of the item of "Education" was disbursed for the maintenance of the Cherokee Orphans Training School, at Tahlaquah, Cherokee Nation (R. 52-60), located miles away from the Seminole Nation, yet the Seminole Nation is charged 3.72 per cent of said amount, or \$62,999.16, notwithstanding the fact that the attendance records show that not a Seminole Indian was in attendance at this school (R. 72), and that the Seminole Nation maintained with tribal funds its own school for the education of its orphan children (R. 72).

Furthermore, the record shows that \$95,758.84 of the total item of "Education" was disbursed in "Aid of common schools" in the State of Oklahoma, (R. 71), yet the Seminole Nation is charged with a part of this money. The appropriations made in aid of the common schools of Oklahoma were begun in the Act of August 24, 1912, c. 388, 37 Stat. 518, 533.

Under the agreements with the United States, certain lands of the Five Civilized Tribes were made non-taxable, and this right was upheld by this Court in *Choate v. Trapp*, 224 U. S. 665. As these lands could not be taxed by the State of Oklahoma, Congress felt obliged to aid the State in providing a public school system. Beginning with said Act of August 24, 1912, Congress appropriated annually

amounts for this purpose, and paid it directly to the school districts of said State. What the United States gave directly to the State of Oklahoma to aid it in establishing adequate public school facilities certainly would not be a gratuity offset against petitioner.

Other Miscellaneous Items

Several other items of disbursements need further explanation and are listed as follows:

Agricultural Aid, Construction and Maintenance of Claremore Hospital, Livestock, Medical Attention, Pay and Expenses of Farmers, Pay and Expenses of Field Matrons, and Probate Expenses.

These items were allowed as gratuity offsets against the claims of petitioner without proof or argument that any part of them were disbursed for the Seminole Nation. Whether or not these items are gratuity offsets would depend largely upon the date of the disbursement. If the disbursements were made before allotment and not in pursuance of a treaty obligation, they would be gratuities, provided it was shown by proof that such disbursements were made for the Seminole Nation. If these disbursements were made after allotment, they would be disbursements for the benefit of individuals, and would not be directly chargeable to the Seminole Nation as a tribe. (*Osage Case, supra, p. 53.*)

As we have seen, the whole object of the agreements made with the Five Civilized Tribes was to extinguish the tribal estates, and wholly to emancipate the Indians. After allotments were made, and the individual Indians received their deeds, relinquishing the interest of the Seminole Nation and of the United States in said lands, the individualization was accomplished insofar as the lands were concerned.

Most of the above expense was incurred over a period from 1911 to 1934. At this time all Seminole lands had been allotted. In its report for the year 1902, p. 43, the Commission to the Five Civilized Tribes reported that:

"The Seminole Allotment work is completed. The last 281 allotments made, however, are yet to be recorded, checked, and certificates of allotment written for same."

In his report for the year 1914, pp. 49-50, the Commissioner of Indian Affairs stated:

"In the Seminole Nation there remain about \$1,800,000 of tribal moneys to be individualized before the tribal affairs can be entirely finished.

"From the foregoing it will be seen that while the work of the Indian Department among the Five Civilized Tribes is approaching completion in tribal matters there necessarily remains a great work to be done among the individual Indians."

In the Hearings before the House Committee on Indian Affairs, 66th Congress, 1st Sess., pp. 254, 259, referred to above, Assistant Commissioner of Indian Affairs Meritt submitted a statement of the status of the affairs of the Five Civilized Tribes, and on page 258 it is stated that:

"The tribal affairs of the Cherokee Nation are practically closed and those of the Seminole and Creek Indian Nations will be disposed of within a short time. The tribal governments of the Cherokee and Seminole Nations have been practically abolished, there being at present no tribal officers.

"Supervision over Restricted Individual Indian Property.

"With the completion of the work relating to the disposal of the tribal property of the Five Civilized Tribes the administration of Indian affairs in eastern Oklahoma is becoming primarily a matter relating to the restricted property and welfare of individual Indians, especially of those classified as restricted Indians."

If subsequent to allotment the United States adopted the policy of furnishing agricultural aid and assistance to some of the individual members of the tribe in developing their

own individual farms, certainly such a policy would not afford respondent the right to claim the amounts thus spent as a gratuity offset against the tribe as a whole. Clearly this money, if disbursed at all for the Seminoles, was a benefit to the individuals who received this aid and was not a benefit to the tribe as a whole.

Even if these disbursements might be considered tribal, the respondent failed to show that any part of these amounts were disbursed for the Seminole Nation, or individual members thereof. As heretofore pointed out, the respondent culled out of the appropriations from which the above items were paid, all amounts disbursed within the Seminole Nation, which amounts have been set up in finding 13 of the lower court. Notwithstanding this fact, in its decision the lower court charged the petitioner with an arbitrary 3.72 per cent. of the moneys disbursed for these items within the limits of the Five Civilized Tribes generally, without proof whatsoever that any part of said items were disbursed within the Seminole Nation. As the lower court states in its decision (finding 19) "what portion of the expenditures set out in Findings 17 and 18 were spent for the Seminole Nation does not appear by the proof." Certainly the lower court erred in charging any part of the above expenses to the Seminole Nation, without requiring proof of the respondent that any of these moneys were disbursed for the Seminole Nation.

Probate Expenses

The lower court charged the petitioner with a part of the money shown in finding 18 to have been disbursed for probate expenses of the Five Civilized Tribes. In the division of the tribal estates under the agreements made with the Five Civilized Tribes the minors shared equally with the adult members of these tribes. To prevent their exploitation, the United States had provided restrictions against the alienation of their lands.

By Section 6 of the Act of May 27, 1908, c. 199, 35 Stat. 312, 313-314, Congress conferred upon the County Courts of the State of Oklahoma probate jurisdiction with supervision of the estates of minor allottees. Said Section 6 also provided that the Secretary appoint local representatives to protect said estates (the necessary court fees to be allowed against the estates of said minors), and investigate their management from time to time, and "to counsel and advise all allottees, adult or minor, having restricted lands, of all of their legal rights with reference to their restricted lands, *without charge* * * *." The Commissioner of Indian Affairs in his report for the year 1914, pages 50-52, explains the work of the probate attorneys under said Act of 1908 as follows:

"The minor children of the Five Civilized Tribes are perhaps the richest average children in the United States, which condition results from the fact that in allotting the Oklahoma Indians the children were given the same number of acres of land as their parents and share equally in tribal funds. Consequently when Congress, in the act of May 27, 1908, conferred upon the county courts probate jurisdiction there was involved a greater amount of probate work than existed anywhere else. This together with the fact that Oklahoma was admitted into the Union in 1907 and that the county judges then elected did not all possess the highest standards necessarily brought about a demoralized, inefficient, and in some instances corrupt condition.

"It is apparent that many guardians were appointed without regard to their fitness and insolvent bondsmen accepted. It was not uncommon for lands of minor Indian children to be sold on appraisements influenced by prospective purchasers and for inadequate prices. Excessive compensation was many times allowed guardians and unreasonably large fees paid to attorneys. Under these conditions the property of Indian children was frequently so ravished that when final reports were called for they were not forthcoming, and estates were often found to have been dissipated and their bondsmen financially irresponsible. Altogether it developed a condition demanding speedy and radical reforms.

"To insure the prosecution of the probate work in a systematic and effective manner a force was organized consisting of the best obtainable attorneys, each of whom was chosen on his merits after careful and exhaustive investigation, to assist and cooperate with the county judges. This force was made up in part of attorneys employed at the expense of the several tribes and partly at the expense of the United States under authority of section 18 of the act of Congress of June 30, 1913.

"Widespread and gratifying results have already been accomplished. Wrongdoers have been prosecuted; estates have been recovered; dishonest and incompetent guardians have been removed; worthless bonds have been replaced with responsible bondsmen; and many thousands of dollars have been saved to Indian minors and invested for their benefit. These direct results are also increased to an extent which can only be approximated by the moral influence which has resulted, operating powerfully to prevent a repetition of wrongdoing and to insure better conditions in the future."

Thus we see that, when the United States attempted to transfer the protection of the estates of minor allottees to the local courts of Oklahoma, the above condition arose and widespread robbery and dissipation of these estates followed. To retrieve some of the property of these estates probate attorneys were appointed. As a part of the necessary expense of protecting these restricted allottees in the possession of their property under the terms of the agreements with the Five Civilized Tribes, the defendant was required to pay this expense.

In the *Heckman* case, *supra*, (224 U. S. 413) the duties of the United States were comprehensively considered and passed upon by this Court. In the statement of this case, it is said (224 U. S. 413, 415):

"The government states in its brief that between July 14, 1908, and October 12, 1909, the United States brought 301 bills in equity against some 16,000 defendants to cancel some 30,000 conveyances of allotted lands * * * upon the ground that the conveyances were in violation of existing restrictions upon the power of alienation * * *"

The defendant demurred upon the ground that the bill was insufficient and that the United States was without the capacity to maintain its suits. The trial court sustained the demurrer, and upon appeal the Circuit Court of Appeals reversed the lower court (*United States v. Allen*, 179 Fed. 13), and the case was then appealed to this Court. This Court held as follows: "Our conclusion is that the suit was well brought" (*supra*, p. 448).

In the consideration of the case, this Court passed upon the duties and obligations of the United States in protecting the allotted lands of the restricted Indians of the Five Civilized Tribes from the "grafters", and this at its own expense. After setting out the policy of the United States to require the Indians to accept allotments in severalty, and to protect the Indians in their individual ownership of said allotments through suitable restrictions, the Court said (p. 438):

"As was well said by the court below, 'If they are unable to resist the allurements by which they are enticed into making the conveyances, will they be expected to undertake the difficult and protracted litigation necessary to set aside their own acts? To ask these questions is to answer them. Congress intended that both the Indians and the members of the white race should obey its limitations. A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States. If these Indians may be divested of their lands, they will be thrown back upon the Nation a pauperized, discontented and, possibly, belligerent people.' The authority to enforce restrictions is the necessary complement of the power to impose them."

And, upon the questions of the performance of these duties and obligations of the United States, this Court said (p. 443):

"It is urged that this clause [of the act of Congress authorizing the suits] did not confer authority to sue, . . . This seems to us a strained construction, in view of the obvious purpose of the act. And it fails

to give adequate effect to the words 'such suits to be brought on the recommendation of the Secretary of the Interior, without costs or charges to the allottees, *the necessary expenses incurred in so doing to be defrayed from money appropriated by this act.*' In addition to the appropriation of moneys for expenditure under the direction of the Secretary of the Interior, that act appropriated the sum of \$50,000 'to be immediately available and available until expended as the Attorney General may direct.' "

This decision sets at rest all questions regarding the duties and obligations of the United States to protect the individual restricted Indians in their property holdings during the period of restrictions, and as the expense of this probate work was a necessary and incidental part of the expense of administering these estates, under the terms of the agreements, it is an expense of the United States and would not be a gratuity offset against the petitioner.

Aside from the above argument, we have the further contention that this probate expense is not a tribal expenditure but inured to the benefit of the individual restricted Indians. After the tribal estates had been *individualized* and were in the hands of individual restricted Indians, this expense was incurred by defendant. As Hon. W. W. Hastings stated in the Hearings before the House Committee on Indian Affairs, at pp. 252-254, referred to *supra*, p. 69, as follows:

"After the tribal affairs of these Indians are wound up, you have the individual restricted Indian that the Government has to look after under this new legislation. With reference to these probate attorneys the Congress of the United States inaugurated that policy. It provided for these things. It thought it necessary in view of the fact that Oklahoma was a new State that it had not been organized from a Territory into a State, that many new people had moved in there, and that they ought to be supervised. Congress after investigation and reports had been made made an appropriation providing for probate attorneys.

"I want to say here in the presence of the assistant commissioner that with the number of restricted In-

dians being reduced, my judgment is that appropriation could be reduced, and that a number of probate attorneys could be employed stationed at convenient places to supervise those estates.

"I felt like a succinct statement ought to go in the record here in order that there might not be an erroneous impression.

"Mr. Elston. I think that is very valuable because we are seeking light here, and in asking these questions, being a new Member, I have no object except to get at the facts, and I assume that nothing will be done that will invalidate any treaty or any obligation in any treaty or any Supreme Court decision that has announced that principle. But as the number of restricted Indians is lessened more and more the obligation would be removed, and my idea is to see whether we are gradually decreasing expenses for these Indians in Oklahoma and keeping pace with the lessening scope of our obligation with respect to them. You have just instanced the possibility that the work of the probate attorneys might be decreased, in view of the fact that the restricted Indians are being decreased * * *"

"The Chairman. I think you ought to go more fully into the question whether or not some arrangement could not be made whereby some part of this \$85,000 for probate attorneys could be borne by the people who were given the benefit of the service.

"Mr. Hastings. That is impracticable. It can not be done. It is not a tribal estate; it is individual, and these Indians are citizens of the United States. The Government of the United States feels that it has a duty to perform with reference to supervising those estates of the individual restricted Indians. The individual restricted Indian would not permit any part of his estate to be taken. For instance, in the Cherokee tribe, how are you going to pay probate attorneys in the Cherokee tribe? He would not pay them. He is not asking for supervision. The Government feels it is its duty to see that the estate is protected and it pays the probate attorneys to come there. The Indian did not ask for them and will not pay them.

"The Chairman. Is the statement that Mr. Hastings is now making the understanding of the bureau, and is that the law as to the probate attorneys?

"Mr. Meritt. I think the statement of Mr. Hastings is correct."

The Act of August 12, 1935, under which defendant claims its gratuity offsets, permits as offsets moneys spent for the benefit of the "tribe or band", and would not permit offsets against the tribe of any moneys spent for individual restricted allottees in protecting them in their individual holdings—tribal lands which had been allotted and individualized under the agreements with these tribes.

Percentages Used by the Lower Court

Although the lower court found that from 1908 to 1928 the Seminole Nation composed 3.08 per cent of the total population of the Five Civilized Tribes, yet the lower court charged the Seminole Nation with 3.72 per cent, or a .64 per cent too much of the total shown in said finding 18 (R. 20, 38). The disbursements set forth in said finding 18 covered the period from the fiscal years 1898-1934, inclusive, and as we have heretofore pointed out, were made for the Five Civilized Tribes generally, and no proof was submitted to show that the Seminole Nation received any part of these disbursements. Yet the lower court charged 3.72 per cent of the total amount to the Seminole Nation.

The percentage of 3.08 for the period from 1908-1928 was worked out from the figures shown by the final rolls compiled by the Dawes Commission during the period 1898-1907. These rolls were prepared pursuant to the act of June 10, 1896, c. 398, 29 Stat. 321, 339; the Curtis Act approved June 28, 1898, c. 517, 30 Stat. 495; the Supplemental Seminole Agreement, ratified by act of June 2, 1900, c. 610, 31 Stat. 250; and the act of April 26, 1906, c. 1876, 34 Stat. 137, 138. The allotments provided for in the Original Seminole Agreement, approved by Congress July 1, 1898, c. 542, 30 Stat. 567, were made in accordance with these rolls.

Clearly these rolls would form the basis from which to work out the percentage of population of the Seminole Na-

tion to the total population of the Five Civilized Tribes for the period 1898-1934; and if the Seminole Nation is liable at all for any part of the expenses set forth in Finding 18, it certainly would be upon this 3.08 percentage basis, and not upon a percentage of 3.72; as used by the lower court. We submit that the lower court erred in charging 3.72 per cent of this total expense against the Seminole Nation.

We believe that we have amply demonstrated to the court the unfairness of the allowances made by the lower court in the gratuity offset phase of this case, and regret that the character and extent of these items required us to make such an extensive argument.

We submit that the lower court erred in failing to require of defendant affirmative proof of the fact as to whether or not said items were a *gratuity* to the tribe and also whether they *benefited the Seminole Nation*, before permitting a gratuity offset for them under said Act of August 12, 1935.

Conclusion.

For the reasons set forth above the petitioner submits that as to the affirmative claims of petitioner the lower court has failed to give due consideration to the treaties and statutes governing the rights of the parties in this proceeding; and that as to the offset phase of this case the lower court erred in making allowances of gratuity offsets against petitioner without sufficient proof that said amounts were *gratuitously* disbursed for the *benefit* of the Seminole Nation as such.

We respectfully request this Court to correct these errors and afford belated justice to these dependent Indian wards of our government.

PAUL M. NIEBELL,

W. W. PRYOR,

C. MAURICE WEIDEMEYER,

Attorneys for Petitioner.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1941.

No. 348.

THE SEMINOLE NATION, *Petitioner,*

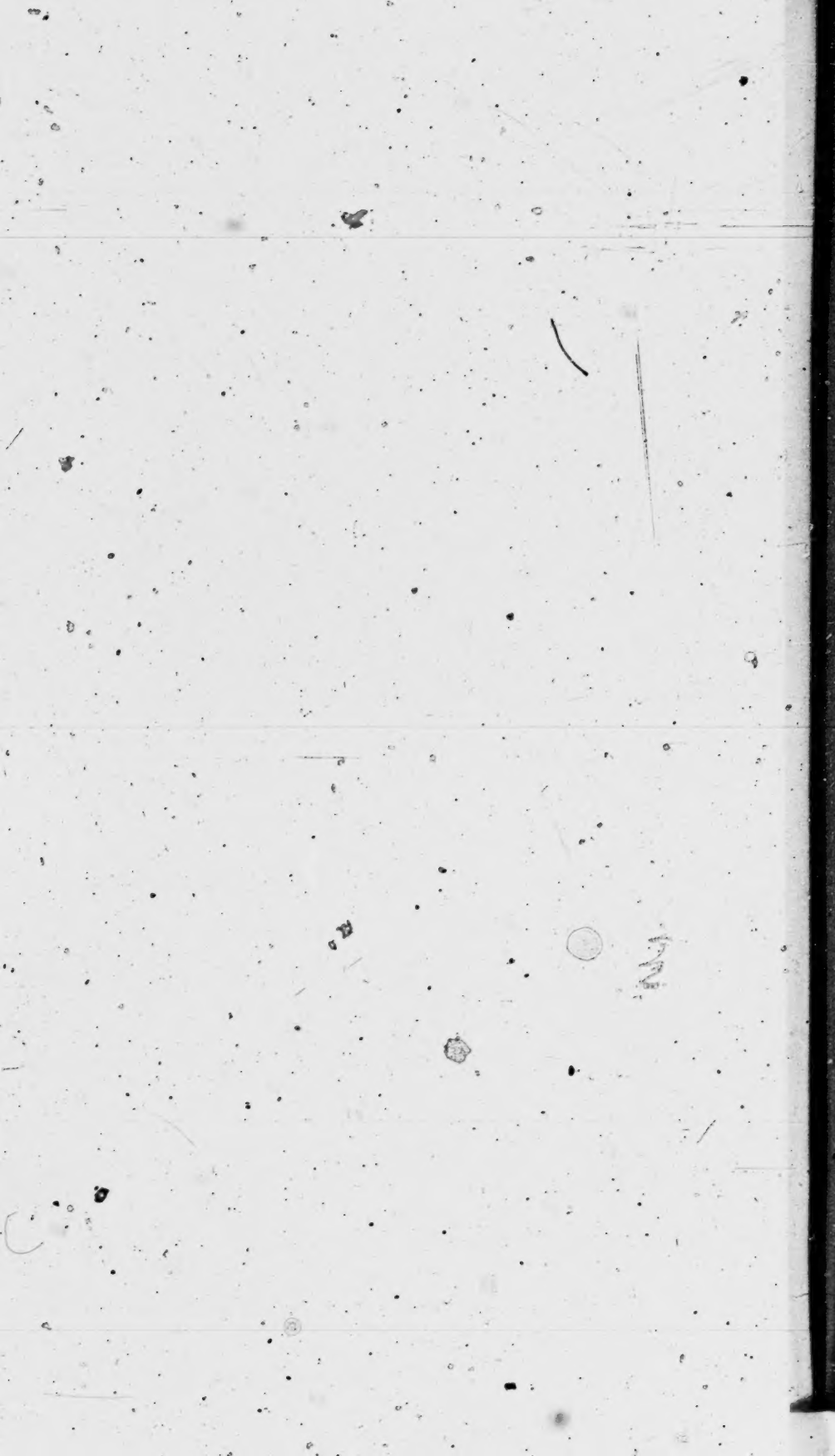
v.

THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

PAUL M. NIEBEL,
C. MAURICE WEIDEMEYER,
W. W. PRYOR,
Attorneys for Petitioner.



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THE UNITED STATES.

On Writ of Certiorari to the Court of Claims.

REPLY BRIEF OF PETITIONER.

*To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:*

Some of the contentions of respondent need comment on our part, and we therefore submit our views on them herein for the consideration of the Court.

Item I.

The respondent states (Res. Br. 13-14):

“To this claim the Government interposes three defenses: (a) that the diversion was authorized by the Resolution of February 22, 1862, and by the Indian appropriation acts for the fiscal years 1863, 1864, 1865, and 1866; (b) that the diversion was ratified by the treaty of March 21, 1866, 14 Stat. 755, 759; and (c) that,

if these defenses are not sustained, the amount expended in feeding and clothing loyal Seminole refugees must be allowed as a gratuity offset under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596."

We will answer these contentions below.

Respondent's Contention (a).

The respondent contends (Res. Br. 17) "that there had been no breach of the treaty prior to the war," because "the treaty contained no requirement that the money was to be spent within the year." The respondent here overlooks the wording of the treaty that these items are to be provided "*annually* for ten years." While the treaty provides that the President direct the manner in which the annual sums are to be applied to these objects, yet it does not permit him to alter the *time* within which the treaty expressly directs this obligation to be fulfilled. The respondent admits (Res. Br. 16) that but \$3,239.08 of the \$36,000 appropriated up to June 30, 1862 was disbursed for these treaty purposes, and clearly the respondent had violated its obligation to petitioner long before the Civil War began.

The Resolution of February 22, 1862, 12 Stat. 614, relied upon by respondent, was superseded by the Act of July 5, 1862, c. 135, 12 Stat. 512, 528. In our initial brief we have shown that President Lincoln refused to put in effect a punitive measure against one of these tribes, and withheld judgment in the matter (Pet. Br. 15), and therefore the act of July 5, 1862 never became effective.

When the Civil War began the Federal troops were withdrawn from Indian Territory and it was overrun by Southern troops. The Seminole Nation was divided in its sympathies and a large portion of them remained loyal to the Union and were driven into Kansas, where their able bodied men enlisted and served in the Union Army (Pet. Br. 16-17).

Should the Resolution of February 22, 1862 and the Act of July 5, 1862 be held to be effective, we submit that then they should be construed as authorizing Seminole money.

to be disbursed for the Seminole refugees only, and not for Indians of other tribes. As heretofore pointed out (Pet. Br. 18), the record shows that but \$31,599.68 of a total of \$249,731.88 of Seminole moneys thus diverted were disbursed for Seminole Indians (R. 22). Surely respondent cannot properly say that it is relieved of the duty to fulfill this treaty obligation because Seminole moneys were disbursed under the Act of July 5, 1862, and other similar acts, for Indians other than Seminoles.

Article 9 of the Treaty of March 21, 1866, 14 Stat. 755, reaffirmed all prior treaty stipulations and the United States thereafter should have complied with its treaty promises.

Respondent's Contention (b).

We submit that respondent has not answered the contention of petitioner that the release in Article 8 of the Treaty of March 21, 1866 does not affect this claim, because the Seminole Nation ratified only such diversions as were made from the *funds of the Seminole Nation*, and these objects for which we claim were to be furnished from the *funds of the United States*.

Under the Treaty of August 7, 1856, trust funds were established in the United States Treasury to the credit of the Seminole Nation, the annual interest thereon at 5 per cent was to be disbursed per capita to the members of the tribe. These were the Seminole *funds* affected by the release, and but \$31,599.68 of the \$249,731.88 thus diverted was disbursed for Seminole refugees. However, the treaty of 1856 required the United States to disburse annually certain of its own moneys for *objects* therein specified—for schools, agricultural assistance, and smiths and smith shops. Thus there is a distinction between annuities which were interest payments due on the "funds of the Seminole Nation," and payments from funds of the United States required to be disbursed for specified treaty objects.

A large amount was due on the treaty obligation to furnish these objects before the outbreak of the Civil War, and it cannot properly be said that this claim would be

affected by the release covering claims for damages and losses growing out of the war, as pointed out in the lower court's first opinion (Pet. Br. 18).

Respondent's Contention (c).

The respondent would have to show affirmatively that the amount, if any, of said \$61,563.42 was expended *gratuitously* for the *benefit* of the *Seminole tribe* as a whole before it is entitled to a gratuity offset under the Act of August 12, 1935, c. 508, 49 Stat. 571, 596.

Item II.

Respondent concedes that it did not comply with the requirements of this treaty but argues that it is excused from such compliance because it is entitled to a set-off for (a) overpayments of \$12,127.54 made in 1875, 1877, 1880, 1882, and 1883; (b) payments of \$66,422.64 which were made pursuant to requests of the Seminole General Council during the period from 1879 to 1874; and (c) the payments of \$62,500.00 made to the United States Indian Agent in 1907, 1908, and 1909 (Res. Br. 25-26).

Respondent's Contention (a).

It will be noticed that the overpayments, totaling \$12,127.54, were made during years for which petitioner makes no claim, and therefore these would be immaterial to the issues herein involved. However, we believe that respondent should have credit for these items, provided they were made in accordance with the law governing the disbursement of this treaty money—the Treaty of August 7, 1856 before 1879, and the Act of April 15, 1874 after 1879, when this Act became effective (R. 69).

Respondent's Contention (b).

That the Seminole Council requested that the moneys be turned over to the tribal officials in violation of the treaty requiring them to be paid per capita, and in violation of

Sec. 2097 of the Revised Statutes, would furnish respondent no defense for the reason that these requests were denied by the Commissioner of Indian Affairs and the Secretary of the Interior. That the directions of the Commissioner and Secretary were disobeyed by respondent's disbursing officers clearly would not work out an estoppel against the petitioner. The refusal of these requests was made upon the ground that the executive officers of respondent were not convinced that the proper disposition of the money would be made if turned over to the tribal officials for disbursement (R. 61-62). Thus there is no showing that the tribe ever received the benefit of this money even if the question of benefit were involved. *Creek Nation v. United States*, 78 C. Cls. 474, 501; *Seminole Nation v. United States*, 82 C. Cls. 135, 149-150.

Nor would these amounts be gratuity offsets under the Act of August 12, 1935 for the reason that the Act expressly states that amounts appropriated and disbursed from tribal funds shall not be gratuity offsets. Respondent says that because the amounts were appropriated out of the Treasury of the United States to pay this interest due on the Seminole trust funds, this interest is not Seminole money and does not belong to the tribe; and therefore, the exception in the Act of 1935 does not apply. This contention clearly has no merit, for when appropriations were made and the amounts set up to the credit of the Seminole Nation they belonged to said tribe. Before respondent is entitled to a gratuity offset under the Act of 1935 it must show *affirmatively* that these amounts were disbursed for the *benefit* of the tribe. Furthermore, these illegal expenditures were not made from appropriations for gratuity objects, but were made from Seminole trust funds. In other words, there was a misspending of the tribal moneys which resulted in the nonpayment of the treaty obligation. We submit that the Act of 1935 does not contemplate that such illegal disbursements would become gratuity offset claims against an Indian tribe. We discuss this matter fully hereafter at pages 26-28.

Respondent's Contention (c).

Clearly the payment by respondent of the \$62,500.00 to the United States Indian Agent for the use of the Seminoles would not denote a payment to the Seminole Nation in accordance with this treaty. By this action the Government merely changed depositories for this money. The respondent admits (Res. Br. 30, footnote 20) that there is no formal finding showing that the money was disbursed during these years in accordance with the treaty, and in the absence of such a finding the respondent is not entitled to this credit. *The United States v. Seminole Nation*, 299 U. S. 417. Nor do the efforts of respondent in going beyond the record in this case and setting up extracts from the report of the General Accounting Office (Res. Br., Appendix 64-65), show that these moneys were disbursed per capita in accordance with this treaty provision during the fiscal years 1907 to 1909. To the contrary, this report shows a misspending of these moneys during these years, and furthermore, the figures do not check.

The respondent is not entitled to a gratuity offset in this amount for the reasons above stated. See discussion pages 26-28 herein.

Item III.

Respondent's Contention (b).

(Res. Br. 32)

The simple answer to respondent's contention is the treaty of March 21, 1866 and Section 2097 of the Revised Statutes. The respondent has shown no statutory authority for paying this money to the Seminole tribal treasurer or in any other manner other than that stated in the treaty.

There is no finding that *this* money actually was disbursed by the tribal officials for schools, even though this were material to the issue. The finding merely is that, "During said period the Seminole Nation disbursed from its treasury not less than the sum of \$7,500 per annum for

the maintenance of its schools" (R. 14). In the absence of such a finding the decision cannot be upheld. *United States v. Seminole Nation*, 299 U. S. 417. In petitioner's initial brief we have outlined generally the manner in which the tribal officials were squandering Seminole funds generally (Pet. Br. 26-27).

The manner in which the tribal funds were squandered by the tribal officials for school purposes is set forth in the report of an investigation of the schools, by Frank C. Churchill under direction of the Secretary pursuant to the Act of March 3, 1901, 31 Stat. 1058, 1074. This report, dated March 14, 1902 (H. Doc. No. 522, 57 Cong., 1 Sess., p. 7), showed that the Seminole officials have entire control of the tribal schools. And speaking generally with respect to tribal schools of the Five Civilized Tribes, Churchill states: "I am convinced that their continuance indefinitely with any semblance of tribal control would be against the best interests of the Indian children, as well as a great waste of tribal funds, I must not refrain from stating that, in my judgment, the school funds belonging to the several tribes in the Indian Territory should, as early as possible, be put beyond the reach of tribal officials."

In view of this report the conclusion of the lower court—that it would make "no difference that the payments were made through the agency of the tribal officials"—clearly cannot be supported (R. 26).

The amount due petitioner under this treaty would not be a gratuity offset for the reasons heretofore stated (*supra*, p. 5).

Respondent's Contention (c)

(Res. Br. 33)

The \$750.00 paid to the United States Indian Agent in 1907 was not shown to have been disbursed in accordance with this treaty and there is no finding to that effect (R. 13, 14, 26). The question is not one of benefit, but whether the United States complied with its treaty obligation.

Clearly this amount would not be a gratuity offset under the Act of August 12, 1935, for the reasons heretofore stated.

Item IV.

(Res. Br. 33)

We have fully answered this contention in our initial brief.

Item V.

With respect to petitioner's claim for Seminole moneys illegally turned over to the tribal officers in violation of Section 19 of the Curtis Act, the respondent states (Res. Br. 36):

"To this claim the Government makes the following answer: (a) the payments were properly made to the tribal treasurer; (b) even if the payments to the tribal treasurer were in violation of section 19, the tribe has no standing to complain; and (c) payments made to the tribal treasurer and by him expended for the benefit of the tribe, if not a discharge of the Government's legal obligations, are in any event gratuity offsets allowable under the 1935 act."

Respondent's Contention (a).

Respondent contends that "Section 19 of the Curtis Act prohibits only payments to tribal officers which are 'for disbursement,' i. e., payments to be distributed by them to members of the tribe." (Res. Br. 36). This limitation is of respondent's own creating, for it is not a part of the statute. The complete answer to this contention is found in the first independent clause of the provision stating:

"That no payment of any moneys *on any account whatever* shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement."

The words "on any account whatever" would negative any such limitation as respondent now suggests.

The history behind this section clearly shows the purpose of this law, and with all of this background before it Congress would not pass a law prohibiting part of Seminole tribal moneys to be disbursed by the corrupt tribal officers, and then by the same law entrust them with the disbursement of other of the tribal moneys. Certainly Congress did not do so in enacting Section 19 of the Curtis Act.

The respondent contends that the mere fact that in the legislative process the language of the second clause was altered, denotes that Congress intended to let the corrupt tribal officers disburse part of these Seminole funds. (Res. Br. pp. 37-39). The change was made in the language of the second clause of the section, and by it the language became more general in effect. Clearly this change would not create a limitation of the scope of the section, that would defeat the whole purpose of this section—to prevent the robbery of the members of the tribe by the unscrupulous tribal officers and insure to all members an equal share of said funds. This change was not made in the first clause of Section 19, which clearly prohibits payments *on any account whatever* to the tribal officers *for disbursement*, and as we have pointed out, this clause is entirely independent of the second clause (Pet. Br. 38-39).

The respondent argues that certain quotations from the Choctaw and Chickasaw and the Creek Agreements are *in pari materia* with Section 19, and that like Section 19, they deal only with payments to members of the tribes; and also that the repeal of the provision of the Act of June 7, 1897, c. 3, 30 Stat. 62, 84, permitting the President to veto acts of the council of the Five Civilized Tribes, tends to show that Congress intended to restore to these tribes full control over their tribal funds (Res. Br. 40-41).

We submit that such provisions show a directly opposite intent, for in both the provisions of the agreements cited, the Secretary of the Interior was required to disburse tribal moneys.

Let us point out to the Court that the provision of the Creek Agreement quoted was a part of a tentative Creek

agreement set forth in Section 30 of the Curtis Act. Evidently, respondent assumed that said Creek-agreement became law upon its ratification by Congress. However, Section 30 required its subsequent adoption by the tribe. As a matter of fact, this agreement never became law for it was never adopted by the tribe (Rept. of Comm. to Five Civ. Tribes, H. Doc. No. 5, 56 Cong., 1 Sess. (1899) pt. 2, p. 9, Cong. Ser. 3916). A subsequent agreement was executed with the Creeks, and was approved by Congress by Act of March 1, 1901, c. 676, 31 Stat. 861. This agreement was adopted by the tribe on May 25, 1901 (Rept. Comm., Five Civ. Tribes, H. Doc. No. 5, 57 Cong., 1st Sess., pt. 2, p. 45, Cong. Ser. 4291). See Sections 32 and 33 of this agreement governing the disbursement of Creek funds.

The provisions of agreements made with the Five Civilized Tribes vary materially from one another, and we are not concerned here with the provisions of the Choctaw and Chickasaw and Creek Agreements with respect to their funds. Therefore we confine ourselves to the present issue under Section 19 of the Curtis Act in its application to Seminole funds.

The provisions of the Act of June 7, 1897, c. 3, 30 Stat. 62, 84, quoted by respondent (Res. Br. 41) was the first step by Congress to curb the power of the tribal officials of the Five Civilized Tribes over the disbursement of tribal funds. Under it, the President was given the power to veto acts passed by the National councils of these tribes. When Section 19 was enacted, prohibiting payments of any tribal funds to the tribal officers on any account whatever for disbursement, there was no further need for this veto power of the President, and as to the Seminoles, the Act of June 7, 1897 was expressly repealed in the Seminole Agreement. Surely the repeal of this provision would not operate to repeal Section 19 of the Curtis Act; nor would such a repeal support a conclusion that Congress intended to give the tribal officers the full and unrestricted control over Seminole funds they had exercised before Section 19 was en-

acted. It would show a directly opposite intent—to leave Section 19 in full force and effect as to the Seminole Nation.

The respondent further argues that the payments in question were not “for disbursement” to members of the tribe, and that Section 19 did not affect the manner of disbursement of the provisions of the trusts under which the tribal moneys illegally turned over to the tribal officers arose (Res. Br. 42-47).

As respondent points out, the authority of the tribal officers to disburse tribal funds was not granted to them by treaty but was purely statutory. The Act of April 15, 1874, c. 97, 18 Stat. 29, provided that the Treaty of 1856 funds be turned over to the tribal officials for disbursement; and the Act of March 2, 1889, c. 412, 29 Stat. 980, 1004, provided for payment to the tribal treasurer of the interest on a trust fund established by that act. Had not the tribal officers abused this privilege there would have been no need for the passage of Section 19, repealing these provisions and prohibiting these officers thereafter from handling this tribal income. However, the whole purpose behind Section 19 was to put a stop to the abuses of this privilege. We have reviewed this whole matter in our initial brief (Pet. Br. pp. 26-31).

The respondent further contends that “If Section 19, properly construed, applied to all payments to the tribal governments, then it was inconsistent with and has been superseded by subsequent special agreements with each of the Five Tribes.” (Res. Br. 47).

This contention was twice decided adversely to respondent by the lower Court (82 C. Cls. 135; R. 28-29). In its last decision the lower court said (R. 28-29):

“We reaffirm our former opinion in this case to the effect that section 19 was intended to apply to the plaintiff. The Secretary of the Interior in making the payments to the tribal treasurer was acting under the authority of an opinion of the Assistant Comptroller of the Treasury. In that opinion the Comptroller held that the Seminole agreement ratified July 1, 1898 (30

Stat. 567), providing as it did for the continuation of existing treaties between the Seminoles and the United States, made section 19 of the Curtis Act inapplicable to the Seminole Nation. He was of the opinion that under these treaties the Secretary of the Interior was authorized to pay funds due the tribe into the tribal treasury; but, as we held in our former opinion, the authority to pay these funds to the tribal treasurer was derived not from a treaty but from the act of April 15, 1874 (18 Stat. 29), which authorized such a disbursement, provided the Council of the tribe agreed thereto. We do not think that the Seminole agreement providing for the continuation of existing treaties had in contemplation an agreement entered into under this Act. It is hardly conceivable that on June 28, 1898, Congress should have passed an Act prohibiting the making of certain payments to the tribal treasurers of all the Five Civilized Tribes, which included the Seminole Nation, and three days later should have passed an Act repealing this provision as to the Seminoles. We are of opinion that the prohibition of the Curtis Act applied to the Seminoles."

The respondent accepted this last decision and filed no cross-petition properly raising the question now presented, and clearly it has now waived the right to attack this conclusion of the lower court. Had respondent properly raised this question, the record would have been prepared properly to present the facts with respect to this whole matter.

The sole question now before this Court is whether Section 19 was misconstrued by the lower court, and whether by such misconstruction the purpose and effect of the section was lost.

However that may be, let us briefly review this matter for the Court.

Respondent says (Res. Br. 49), "If Section 19 be construed as prohibiting all payments to the tribal officers, including the payment of the expenses of maintaining and conducting the tribal governments (as distinguished from payments for disbursement to members of the tribe), then the section is plainly inconsistent with the Seminole agreement."

Respondent further argues that the Seminole agreement contemplated that the Seminole government would continue to exist until the affairs of the tribe were concluded (Res. Br. 49).

We believe that the fallacy in this argument lies in the fact that it presumes that the continuance of the tribal government would depend wholly upon the disbursement of the tribal funds by the corrupt tribal officials. It is evident that the Seminole government could continue even though the necessary disbursement of the Seminole moneys for this purpose were made by the Secretary of the Interior, who could have insured the proper disbursement of these funds. There is no provision in the Seminole Agreement authorizing the Seminole officials to disburse Seminole tribal funds for this purpose, but thereunder the Secretary of the Interior is required to disburse them—a manner wholly *consistent* with Section 19.

As heretofore pointed out the sole right of the Seminole officials to disburse Seminole moneys was not created by treaty, but was merely statutory, and was repealed by Section 19 of the Curtis Act.

In *Creek Nation v. United States*, 78 C. Cls. 474, (a final decision), the Government took the position that under Section 19 of the Curtis Act and the Creek Agreement the Secretary of the Interior was authorized to make payments for the continuance of the tribal government, a position directly opposite to the one now advanced. After reviewing Section 19 of the Curtis Act, the Original Creek Agreement, ratified by Act of March 1, 1901, c. 676, 31 Stat. 861, and the Act of April 26, 1906, c. 1876, 34 Stat. 137, the Court therein said (p. 487-490):

“ . . . The authority to disburse the tribal funds and all moneys coming to the tribe under the provisions of the three Acts was lodged solely in the Secretary of the Interior.

Section 19 of the Curtis Act changed only the manner in which the Creek tribal funds were to be disbursed.

Neither that section nor any other provision of the act defines or limits in any way the purposes for which the tribal funds might be expended. These funds were no longer paid into the Creek National Treasury by the United States for the purpose of disbursement by the tribal authorities but were retained in the Treasury of the United States to the credit of the tribe, and were disbursed by the Secretary of the Interior. The disbursements complained of were largely for purposes identical with those for which the funds had been expended during the preceding years by the tribal authorities. Congress undoubtedly contemplated, and intended that the tribal funds would continue to be expended in the future, as they had been in the past, for the benefit of the Creek Nation and its people. Consequently, we think that when Congress, by the provisions of section 19 of the Curtis Act, took away from the Creek tribal authorities the control which they had formerly exercised over the disbursement of their tribal funds and charged the Secretary of the Interior with the duty of disbursing the funds, without defining or limiting the purposes for which they might be expended, it by clear and necessary implication invested him with authority to disburse and expend the funds in such manner and for such purposes as would, in his judgment, satisfy the needs of the Creek Nation and promote the welfare and happiness of its citizens, subject to such limitations as Congress might subsequently impose."

By this argument in that case the respondent defeated a large portion of the claim of the Creek Nation. Now it seeks to reverse its position in this case to defeat this claim of the Seminoles.

Thus, under the holding in the Creek case the Secretary could have disbursed Seminole funds for the continuance of the Seminole Government. Had the Secretary disbursed Seminole funds as he did the Creek funds, he would have implicitly complied with Section 19 and the Seminole agreement. Furthermore, he would have properly applied the Seminole funds to the purposes that would best benefit the Nation as a whole, and the Seminole officials would not have

been permitted further to squander the tribal income and reap the benefit of these funds for themselves. This protection was all the other members of the Seminole Nation requested in their protests.

Under the Curtis Act and the Seminole agreement the United States took over substantially all of the functions of the Seminole government, and its continuance should have entailed a minimum of expense to the tribe. To extinguish the tribal governments and individualize the tribal holdings was the whole purpose of this new Governmental policy with respect to the Five Civilized Tribes.

Clearly there is no inconsistency between Section 19 and the Seminole Agreement as the manner of disbursement is the same in both provisions—that the Secretary of the Interior disburse Seminole funds.

The respondent further contends that "The inapplicability of Section 19 to the payments in question is supported by the administrative construction, which in turn has been implicitly approved by Congress" (Res. Br. 50).

Let us review briefly for the court just what happened with respect to these opinions.

In its report of October 3, 1898 the Dawes Commission states in part as follows (H. Doc. No. 5, 55th Cong., 3 Sess., p. cxliv, Cong. Ser. 3756):

" * * * The knowledge of the preparation of this bill [Curtis Act] aroused great opposition of those in the Territory opposed to any change in the existing use of tribal property by the few controlling the government of the Territory. Accordingly large delegations were sent to Washington, at great expense to their National treasuries, for the purpose of preventing such legislation and procuring, if possible, the repeal of the law taking away so much of their political power, which was to take effect January 1, 1898. * * *"

No sooner had the Curtis Act been passed, than the Brown brothers, Seminole Principal Chief and Treasurer, who were in Washington opposing this legislation, and their attorney, Samuel J. Crawford, raised the question as to whether Sec-

tion 19 applied to the Seminole Nation, in an endeavor to secure an administrative construction that would permit them to retain control of these Seminole funds.

The Secretary of the Interior referred the question to Assistant Attorney General for the Interior Department, Wilis Vandevanter, later Mr. Justice Vandevanter of this Court, who then occupied a position now held by the present Solicitor for the Interior Department. Assistant Attorney General Vandevanter perforce came into contact with the members of the Dawes Commission, with the representatives of the various tribes, and with everyone interested in drafting and discussing the laws which would prevent the then existing abuses in the Indian Territory. He saw every angle of this whole problem; he knew the history of the abuses and the purposes and intent of both executives and legislators to correct them; and he understood thoroughly every step taken for the solution of this problem. He lived all of it and had before him vividly and accurately then, what now appears to us but dimly through the many years that have since elapsed. With all of this light before him Assistant Attorney General Vandevanter held that Section 19 applied to the Seminole Nation and that the manner of disbursement under the Seminole agreement was the same. This opinion is printed in full in the appendix to respondent's brief, pp. 33-37, and a review of it shows clearly that there is no inconsistency between Section 19 and the Seminole Agreement.

We have seen that the very thieves at whom Section 19 was aimed had been present in Washington to oppose it. Thunderstruck at the Vandevanter opinion, they had it withdrawn, and transferred to the Comptroller for decision. Although this decision was withdrawn because it was not conclusive (Res. Br., Appendix 38), yet it was never repudiated. While Assistant Attorney General Vandevanter prepared the letter for submission to the Comptroller, as pointed out by respondent, yet he did not argue *personally* for the views set forth therein, as respondent seems to sug-

gest (Res. Br., 53). He merely presented the views advanced by the corrupt Seminole officials and their counsel, as will readily be seen from that portion of his letter incorporated in the erroneous Comptroller's decision of August 23, 1898 (Res. Br., Appendix 39-54). As Assistant Attorney General Vandevanter states: "the Seminole tribe insist", "the tribe contends", and then he sets out contentions now advanced by respondent. Then followed the erroneous Comptroller's decision of August 23, 1898. Thereafter, the Secretary followed the erroneous Comptroller's decision, and disbursed these moneys in violation of Section 19.

The lower court pointed out the fallacies in the reasoning of the Comptroller—that the right of the tribal officials to disburse tribal funds was not provided by treaty, but was statutory—and held that the Vandevanter opinion properly sets forth the correct decision of the legal question presented.

Let us briefly review for the Court just what happened with respect to these decisions and bring the narrative down to an unbelievable conclusion. Disregarding the Vandevanter opinion, the Secretary refused to disburse Seminole funds himself, and turned them over to Brown et al., until the fiscal year 1907, when the Act of April 26, 1906, c. 1876, 34 Stat. 137, became effective.

The Act of April 26, 1906 was a general law applying to all of the Five Civilized Tribes, as was the Curtis Act, and under it the Secretary of the Interior was given control over the tribal schools and the right to pay certain claims. The question arose under this Act whether the Seminole officials or the Secretary of the Interior could control the disbursement of Seminole funds, and the Secretary referred it to the Comptroller for decision.

The Comptroller replied referring to and reaffirming his decision of August 23, 1898, which overruled the Vandevanter opinion, and followed the same reasoning and quoted this earlier decision, holding that a part of the funds should be turned over to Brown, et al., but that the Act of 1906, be-

ing so specific, required that the Secretary disburse a part of these funds for certain specific purposes (Res. Br., Appendix, 55-58, quotes part of this decision).

Dissatisfied with "half a loaf," and reversing the order of their former proceeding of having the question referred from the Assistant Attorney General to the Comptroller, the Browns and Crawford now had the question referred from the Comptroller to the Attorney General. They attacked the constitutionality of the Act of 1906. Passing upon all the questions involved, the Attorney General held that none of the Seminole funds were to be turned over to Brown, et al., but that all of these funds were to be disbursed by the Secretary (26 Op. Atty. Gen'l. 340). Thenceforth the Secretary disregarded the Comptroller's decision, and followed the Attorney General's opinion, disbursing all of these funds himself, and our cause of action upon this claim ceased.

Let us call attention to the fact that in this last decision, while another and later act had entered into the matter, the Comptroller followed exactly the same reasoning he used in overruling the Vandevanter opinion—in fact, he quoted that former decision and made it a part of his later one. While Attorney General Bonaparte does not mention Section 19 or pass upon the effect of it, for a later statute is involved, his line of reasoning is very much the same as that used by Assistant Attorney General Vandevanter.

From what we have thus before us, two things strike us most forcibly: first that the Comptroller could not have been right the first time and Assistant Attorney General Vandevanter wrong, if the Comptroller was wrong the second time, and Attorney General Bonaparte right; and second, that the Secretary could not have felt forced to follow the Comptroller's decision the first time, when he refused to follow it the second time.

The respondent suggests that the administrative construction of Section 19, as set forth in the erroneous Comptroller's decision of August 23, 1898, is entitled to great weight. But we have pointed out that there are decisions from re-

spondent's administrative officers on both sides of the question. From the above we have seen that the administrative construction of Section 19 was inconsistent and not consistent as defendant would lead the Court to believe.

With respect to Creek funds there was a Comptroller's decision, dated August 30, 1898, holding that after the ratification of the Creek Agreement, Section 19 of the Curtis Act was inapplicable (5 Comp. Dec. 93). However, the Secretary disregarded this decision and disbursed Creek moneys under Section 19 (*Creek Nation v. United States*, 78 C. Cls. 474). In the case at bar he disregarded the Vandeventer opinion and followed the Comptroller's decision. As the Secretary disregarded the decision of the Comptroller in the Creek case, the mere fact that he followed a decision of that officer in the Seminole case would not clothe the latter decision with greater dignity, nor could such action affect the question before us upon its legal merits. In other words, it cannot be said that the Comptroller's decision in this case is a defense for the Secretary's action, because he disregarded administrative decisions at will—disregarding one with respect to Creek tribal funds, and following one and disregarding another with respect to Seminole tribal funds as to the effect of Section 19.

Under the circumstances enumerated above, respondent cannot successfully contend that the Court should apply the rule of administrative construction. We believe that this rule has no application to the situation before us. In *Houghton v. Payne*, 194 U. S. 88, 99, this Court stated as follows:

... it is well settled that it is only where the language of the statute is ambiguous and susceptible of two reasonable interpretations that weight is given to the doctrine of contemporaneous construction. *United States v. Graham*, 110 U. S. 219; *United States v. Finnel*, 185 U. S. 236. Contemporaneous construction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the court as to the original correctness of such construction. A custom of the

department, however long continued by successive officers, must yield to the positive language of the statute. As was said in the Graham case (p. 221), 'if there were ambiguity or doubt, then such a practice, begun so early and continued so long, would be in the highest degree persuasive, if not absolutely controlling, in its effect. But with the language clear and precise, and with its meaning evident; there is no room for construction and consequently no need of anything to give it aid. The cases to this effect are numerous.'

The language of Section 19 is clear, its intent is plainly evident from its history, and we submit that the Secretary should have followed it.

The respondent suggests (Res. Br. 56) that Congress impliedly ratified the action of the Secretary of the Interior in violating the plain language of Section 19, by continuing to make appropriations for the payment of interest on Seminole trust funds after the Secretary's action had been reported to it. The reports relied upon by respondent were statements made to the Commissioner of Indian Affairs, and not to Congress, which were later included in the annual reports of the Secretary to Congress. There is no showing that Congress ever had them under consideration, or acted to adopt the Comptroller's erroneous construction of Section 19, or otherwise evidenced an intention to change in any manner the directions set forth in Section 19.

The fact that Congress continued to make appropriations to fulfill its obligations to pay interest on Seminole trust funds clearly would lend no support to respondent's present contention.

Congress, having acted specifically to protect Seminole funds by the passage of Section 19, delegated to the Secretary of the Interior and the administrative officers under him the duty to disburse these Seminole funds, and while this provision was in force and effect the Secretary was duty bound strictly to comply with it.

Respondent's Contention (b).

The respondent contends that if the payment of the \$864,702.58 to the tribal treasurer was in violation of Section 19 of the Curtis Act, the petitioner has no standing to complain (Res. Br. 57).

Under this general contention respondent says that Section 19 gave no right of action to the Seminole Nation because it was merely a direction to the fiscal officers of the United States, which Congress could change at will (Res. Br. 57). In support of this contention it cites the *Sac and Fox* case, 220 U. S. 481.

We submit that respondent's interpretation of this decision fails to recognize (1) that the Seminole *tribe* is party plaintiff in the case at bar, and is suing for *tribal* income due the tribe under treaties; whereas, in the *Sac and Fox* case, the party plaintiff was a band of individuals who had severed their connection with the tribe, claiming the right to sue for tribal annuities by virtue of the Act of 1852, which was not intended to give these individual Indians any right to sue for annuities due under contracts with the tribes; (2) That Section 19 of the Curtis Act was intended to change the former manner of disbursing the moneys due the Seminole Nation, whereas the Act of 1852 referred to in the *Sac and Fox* case did not change the manner of disbursing the annuities due under the treaties with the tribe; (3) That no question of violation by the Secretary of the Interior of the Act of 1852 was involved; as is involved in the case at bar.

Had the *Sac & Fox* tribe sued the United States for a failure to pay its annuities in accordance with the plain directions of Congress in the Act of 1852, we would have had a somewhat analogous case to the one at bar, provided Congress had intended to change the treaties in this respect. However, individual Indians forming a band, wholly unconnected with the tribe, and claiming annuities promised to the tribe by treaties, and claiming a right to sue for a part of the tribal annuities by virtue of said Act of 1852, clearly would not transform the Act of 1852 into one creating a new

right in individuals—not connected with the tribe—to sue the United States for annuities due the tribe under treaties made with the tribe. This is all this case held, and we think the decision was correct. As this Court clearly pointed out, “The Government did not deal with individuals but with tribes. * * * The promises in the treaties under which the annuities were due were promises to the tribes.”

In the case at bar the Seminole Nation is party plaintiff and in suing for the failure of the Secretary of the Interior to follow the plain provisions of Section 19, which was passed for the sole purpose of preventing the robbery of the tribal income by the unscrupulous tribal officers, and insuring to the tribe the proper distribution and benefit of its tribal income due under treaties and agreements made with the tribe: This money was not paid to the tribe, but continued to be paid over to these corrupt tribal officers, and the tribe got no benefit therefrom. Had the individual Seminoles filed suit, claiming their share of the tribal annuities due the tribe under treaties on the theory that Section 19 gave them an individual vested right in tribal annuities, the suit would be somewhat analogous to the one brought by the band of Sac & Fox Indians, and clearly that decision would apply in such a case. But the case at bar is not such a case.

Clearly there is no merit to this contention of respondent.

The respondent further contends (Res. Br. 63) that the petitioner having requested that the tribal moneys be turned over to the tribal officers is now estopped to receive payment a second time.

If the Seminole officials constituted the Seminole Nation and all the tribal income was to be disbursed solely for their benefit then the respondent would be correct in its contention. But Congress decided that the other members of the tribe were entitled to an equal share of the tribal income along with the tribal officers, and Section 19 was specially enacted to insure to all members of the tribe an equal share of the tribal moneys.

While it is true that the lower court found that “These moneys were paid to the tribal treasurer at the request of

the ^{council} ~~counsel~~ of plaintiff, but over the protest of some of the individual members of the tribe," yet the sole citation of respondent in its brief (C. Cls. Br. p. 158), in support of this finding was a reference to the Comptroller's erroneous decision of August 23, 1898, in which it is stated that "The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe." (Res. Br., Appendix 49.) This statement clearly does not support the finding by the lower court that the payments were made "at the request of the council of plaintiff." However, that may be, we submit that even if such an act were passed by the Seminole council, it would not have the effect of overriding an act passed by Congress within its plenary power over Indian affairs.

All efforts to prevent the application of Section 19 to Seminole moneys were made by the unscrupulous tribal officers, and not by the tribe. These efforts of the tribal officers could not bind the tribe, for under Section 19 they ceased to be representatives of the tribe in matters concerning the disbursement of the tribal income. In fact, the tribe, as best it could, protested the manner in which these officers were using Seminole funds. In the protest of January, 1898 (Sén. Doc. 105, 55th Cong., 2nd Sess., pp. 3, 4), the Seminoles stated:

"The national funds of the Seminoles are absorbed by only a few of their citizens who have grown rich at the public expense, and we firmly believe that these few persons are oppressing the poorer ones. . . .

"We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. Therefore, in conclusion, we desire to say that while the legislation has not been in line with our wishes, we must perforce of circumstances accept the

inevitable. We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. * * *

Another protest of the Seminoles forms a part of the record (R. 64).

The doctrine of estoppel is salutary and is applied to prevent fraud and not to cover it; and under the circumstances in this case defendant could not use it as an excuse for its plain violation of the wholesome provisions of Section 19, and in aiding the continuation of the dissipation of Seminole funds by the officers of this tribe:

In the face of the positive provision of Section 19 forbidding the payment of Seminole tribal funds to the Seminole tribal treasurer, and the whole history behind it, defendant cannot say that it lacked knowledge of the facts, or was misled by the act of the plaintiff tribe. It is a well established principal of law that:

"As a corollary to the proposition that the party setting up an estoppel must have acted in reliance upon the conduct or representations of the party sought to be estopped, it is a general rule essential that the former should not only have been destitute of knowledge of the real facts as to the matter in controversy, but should have also been without convenient or ready means of acquiring such knowledge. One relying on an estoppel must have exercised such reasonable diligence as the circumstances of the case require. If he conducts himself with a careless indifference to means of information reasonably at hand or ignores highly suspicious circumstances which should warn him of danger or loss he cannot invoke the doctrine of estoppel." 21 C. J. 1129-30.

The respondent had before it, at the time it decided to turn these Seminole moneys over to the Seminole tribal officials, the protests of the members of the tribe, and also the various reports of the manner in which the tribal officials were disbursing these funds; it knew it was dealing

with these tribal officers, the very ones against whom Section 19 was aimed. Therefore, respondent cannot now claim that petitioner is estoppel to assert its claim; and use this principal as an excuse for its plain violation of Section 19.

The question now before us is not a payment a second time, but the proper payment a first time. By failing to follow the plain directions of Congress, as expressed in Section 19, the Secretary paid the Seminole income to persons not authorized to receive it on behalf of the tribe, and we submit that the United States is now liable to the rightful owner of these funds.

The respondent states that the record fails to show that the failure of the Secretary to follow Section 19 resulted in actual damage to the tribe (Res. Br. 63).

In our initial brief we have reviewed the manner in which Seminole funds were disbursed by the tribal officers to show the Court that these officers alone benefited (Pet. Br. 29-36). We have set forth the protests of the Seminoles themselves showing that their officials were amassing large fortunes at the expense of the other members of the tribe, that the national funds were completely absorbed by the few officials (*supra*, 23-24), and that the Indians never received the moneys appropriated for them.

Certainly we have shown damage resulting from the failure of respondent to comply with Section 19, which permitted this condition to continue to exist after Congress in positive language forbade payments to these corrupt tribal officials. We submit that we have made out a claim against respondent.

Under these circumstances, we submit that the tribal books are entitled to little weight; they are self-serving, and nobody had anything to do with them but the officials. In 10 Ruling Case Law, Par. 372, p. 1174, it is stated that:

"It has been said that books of account are received in evidence only upon the presumption that no other proof exists. They are justly regarded as the weakest

and most suspicious kind of evidence. The admission of them at all is a violation of one of the first principles of the law of evidence, which is, that a party shall not himself make evidence in his own favor."

The wrong complained of would not be shown by the books prepared by the corrupt tribal officials.

We submit that after Section 19 was passed payment to the tribal officials was not payment to the tribe and the respondent is liable to the tribe, the rightful owner of the funds. *Burnell v. United States*, 44 C. Cls. 535, 548 (Pet. Br. 39-40). Furthermore, to hold that the Secretary had the legal right to expend tribal funds in a manner positively prohibited by Congress would be equivalent to holding "that the Secretary of the Interior, not Congress, had full administrative control and power over the property of the plaintiff tribe." *Creek Nation v. United States*, 78 C. Cls. 474, 491.

Respondent's Contention (c).

The respondent finally contends that "If it be held that the payments made to the tribal treasurer did not discharge the Government's legal obligations to the tribe, it seems clear that these payments, since they were made at the tribe's request and for its benefit, are gratuity offsets under the 1935 act" (Res. Br. 64).

Here again respondent *assumes* that the moneys were properly paid to the tribe, and that the tribe received the benefit of it. This contention also overlooks that plain proviso in the Act of August 12, 1935, c. 508, 49 Stat. 571, 596, which reads as follows:

"That funds appropriated and expended from tribal funds shall not be construed as gratuities."

The Conference Report on the above bill (H. Rep. No. 1715, 74th Cong., 1 Sess., p. 8) states the intention of Congress in making this exception as follows:

"Expenditures from tribal funds are not to be considered as gratuity expenditures."

When this gratuity matter was before the Senate, and in Conference, as attorneys for several of these Five Civilized Tribes whose rights were greatly affected, we were requested to submit to Senator Hayden, who had charge of this matter, a substitute provision for the one passed by the House. We included in our substitute provision the above exception, having in mind just such a situation as is presented in this case. In our memorandum accompanying the substitute provision, we stated as follows:

"Also certain errors were made by the United States in the handling of certain treaty annuities, trust funds and other property of the Indians, and recovery is sought by the Indians because of these dissipations of their property. It would be most unfair for the Government to take advantage of its own errors by permitting it to off-set such amounts as gratuities to defeat legitimate claims of the Indians."

Evidently this memorandum was before the Conference Committee when this exception was placed in the Act of 1935. By this exception defendant is prevented from taking advantage of its own illegal action to defeat the just claims of the Indians. In other words, without this exception respondent could use its own illegal action as ground for an affirmative gratuity offset claim against the legal and equitable claims of an Indian tribe.

These illegal expenditures were not made from appropriations for gratuity purposes, but were Seminole trust funds. In other words, the respondent failed to comply with a specific direction of Congress as to the manner in which these *tribal funds* were to be disbursed. And clearly the Act of 1935 does not contemplate that such illegal disbursements would become gratuity offsets against an Indian tribe.

Even if tribal funds were not expressly excluded as gratuities from the Act of 1935, yet respondent would have to prove affirmatively that the amounts were expended *gratuitously* and for the *benefit* of the *tribe*, before it would be

entitled to a gratuity offset. This respondent has failed to do.

We submit that there is no merit to this contention of respondent.

These illegal expenditures were not made from appropriations for gratuity purposes, but were Seminole trust funds. In other words, the respondent failed to comply with a specific directions of Congress as to the manner in which these *tribal funds* were to be disbursed. And clearly the Act of 1935 does not contemplate that such illegal disbursements would become gratuity offsets against an Indian tribe.

GRATUITY OFFSETS.

Item VI.

The respondent states that petitioner apparently does not challenge the lower court's decision with respect to certain items of gratuity offset (Res. Br. 65-66).

The petitioner here challenges all gratuity offsets, not conceded, upon the general ground that the lower court threw upon it the burden of proving that the respondent was not entitled to a gratuity offset, instead of requiring of respondent affirmative proof that the items claimed were gratuity offsets (Specification of errors, No. 1, Pet. Br. p. 11). The petitioner conceded in the lower court the item of \$31,083.79 (Finding 9, R. 16). No other items were conceded, though petitioner pointed out to the lower court that they might possibly be gratuity offsets, and that before respondent was entitled to them the burden was on it to prove that they were gratuity offsets. (Plaintiff's Reply Br., C. Cls., pp. 256, 266, 272.)

Item VII.

As originally passed the jurisdictional acts of the Five Civilized tribes did not provide for gratuity offsets against these tribes. The Act of May 20, 1924, c. 162, 43 Stat. 133,

originally authorizing this suit provided a legal forum whereby the Seminole Nation might have a determination of its legal and equitable claims, and the United States was authorized to present its claim against the tribe.

There was a reason for this distinction between the Five Civilized Tribes and what are termed the "wild tribes." The Five Civilized Tribes did not receive large sums of money from the Government for their support. Their income was derived from the proceeds of the sales of their lands to the Government, which were deposited in the Treasury to the credit of these tribes, and provided an annual income to them. Being advanced in civilization, generally speaking these tribes were given the right to administer their own affairs, including the control over the disbursement of their tribal income.

The "wild tribes" had great areas of land but little annual income, and many of them were wholly dependent upon the Government for support. While on the one hand there were few *gratuity* payments made to the Five Civilized Tribes, yet large amounts were disbursed for the support of the "wild tribes."

This distinction has always been recognized by those familiar with Indian affairs; and it was recognized by Congress when it considered the jurisdictional acts of the Five Civilized Tribes, and for that reason no provision for gratuity offsets was placed in the acts of the Five Civilized Tribes. While in the other "wild tribes" acts, it was the custom to insert provisions for such gratuity offsets.

In 1935, the House Committee on Appropriations inserted in the middle of the Second Deficiency bill, a provision to make gratuity offsets applicable to Indian claims generally, without knowledge of the Chairman of the House Indian Affairs Committee, the Interior Department, or plaintiffs whose rights were greatly affected. Under a "gag" rule the bill was rushed through the House, and no objection could be made to the provision as being new legislation on an appropriation bill.

When the bill reached the Senate, considerable opposition arose to the provision, and the manner in which it was passed by the House, and the provision was struck out *in toto*.

The matter went to conference and resulted in the compromise provision which became the Act of August 12, 1935. Even though this provision was made to apply to the Five Civilized Tribes, yet we felt that under a proper construction of the act, in the light of the obligations of the United States assumed in treaties and agreements, and in carrying out its policies toward these Five Civilized Tribes, the courts would recognize the distinction between the obligations of the United States to these tribes and the "wild tribes."

However, we believe that the failure of the lower court to recognize this distinction has led to the errors made by it with respect to the gratuity allowances in this case.

We have pointed out to the Court that most of the gratuity allowances made by the lower court were for administrative expenses in carrying out the obligations of the Government under its treaties and agreements with the Seminole Nation, and in furthering its general policy toward the Five Civilized Tribes.

The respondent is in error in suggesting that the principle stated in the *Osage* case, 66 C. Cls. 64, 82, was later repudiated by the lower court (Res. Br. 98). While it is true that the lower court reversed its stand on the education of individual Indians at nonagency schools on the ground that this benefited the tribe as a whole, yet it has not repudiated the principle that disbursements for individuals, as contrasted with those beneficial to the tribe as a whole, are not gratuity offsets against the tribe. In fact, the Act of 1935 requires the gratuity to be disbursed for the benefit of the tribe as a whole before it is to be allowed as an offset against a tribal claim.

We thought respondent would concede that the amount of \$62,999.16 charged against the Seminole Nation for the expenses of maintaining the Cherokee Orphans Training School, when it was shown that not a Seminole Indian was

in attendance at the School, and that the Seminole Nation maintained a school for its orphan children from tribal funds. But petitioner insists that it is entitled to this offset on some theoretical benefit the Seminole Nation might receive from the fact that the school was established for all of the Five Civilized Tribes (Res. Br. p. 97). We submit that the Act of 1935 requires the respondent to prove actual benefit to the Seminole Nation before it is entitled to a gratuity offset.

We have carefully outlined our other views in our initial brief and we need not reiterate them here.

As these erroneous allowances now stand as a charge against the Seminole Nation we earnestly request the Court to settle the issues with respect to them.

Finding 10.

The respondent contends that the lower court erred in holding that it was entitled to a gratuity offset for the \$165,847.17 disbursed for 175,000 acres of Creek lands for the use of the Seminoles, and that it is entitled to a total of \$175,000.00 as a gratuity offset (Res. Br. 72, 75). The petitioner contends that the lower court erred in the allowance of any amount thus disbursed as a gratuity offset, for this item was purely an element of reparation for errors made by the Government. As set forth in petitioner's brief in case No. 830, pages 27-28, the view advanced by the respondent was rejected by Congress when the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, was before Congress for consideration.

The view expressed by the Commissioner of Indian Affairs, H. Price, in his letter to the Secretary of the Interior, dated January 9, 1882, that the Seminoles be required to release lands on the west side of their domain in lieu of the 175,000 acres added to their domain (set forth in footnote 49 of respondent's brief, pp. 77, 78; Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 2), was rejected by Congress; and the view expressed by Acting Commissioner of Indian Affairs, Thomas M. Nichol, in his letter to the Secretary,

dated February 18, 1881, that the Seminoles should not be charged with this expense as the error was made by the Government (Pet. Br. pp. 45, 46; Sen. Ex. Doc. No. 75, 47th Cong., 1st Sess., p. 7, Cong. Ser. 1989), was accepted by Congress.

Therefore Congress determined that this item was a matter of reparation to the Seminoles, and in the Act of August 5, 1882, c. 390, 22 Stat. 257, 265, provided that payment be made out of public funds. We submit that this determination of Congress with all of the facts before—including the two views above set forth—would finally settle the matter.

We have thoroughly discussed this item in our brief in case No. 830, this Term, and also in our reply brief in that case, and we respectfully refer the Court to our views set forth therein.

Respectfully submitted,

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NO. 348

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT
OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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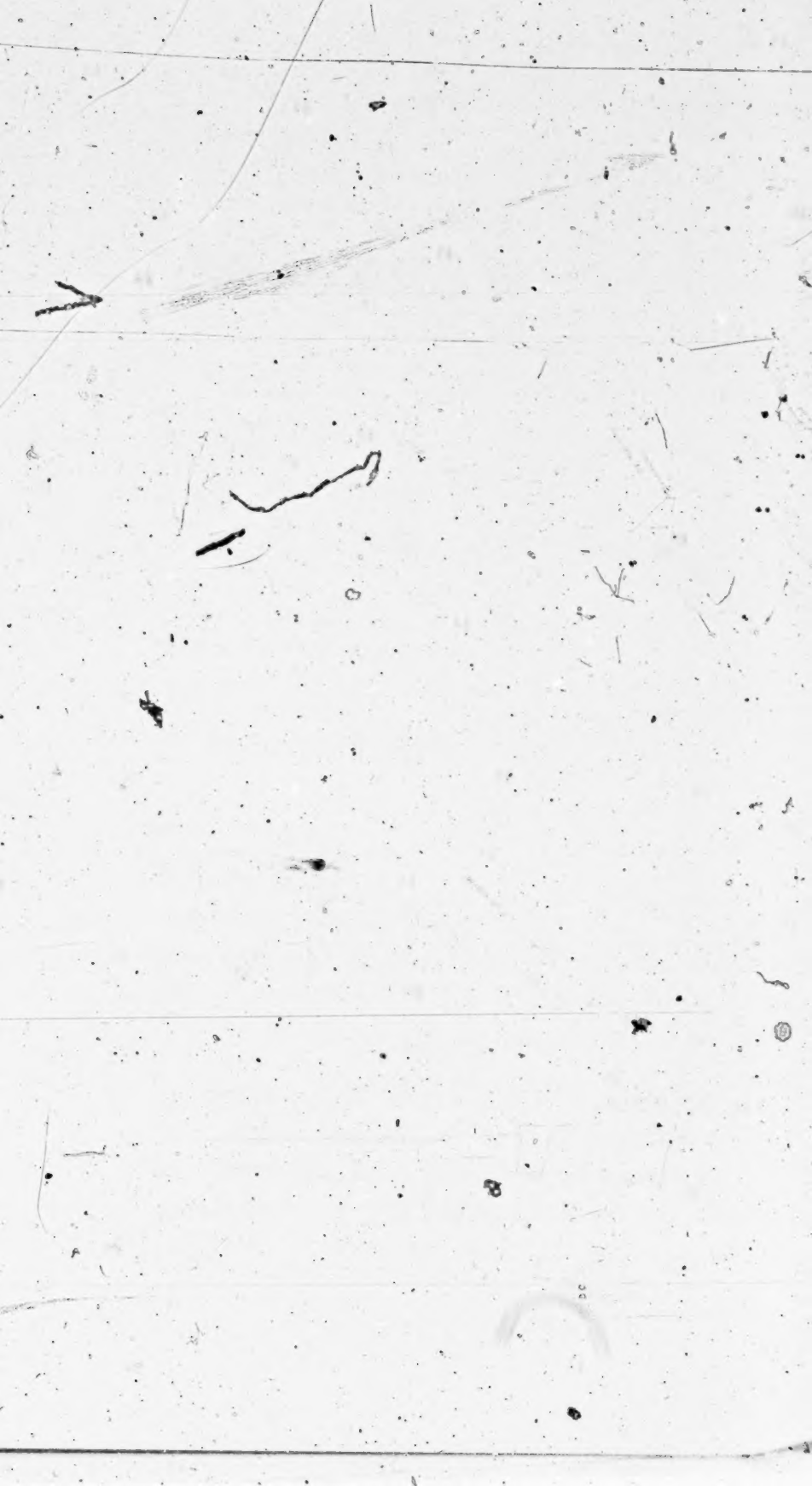
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OPINION BELOW

The opinion of the Court of Claims (R. 21-39), as modified upon rehearing (R. 39-42), is not yet reported. For earlier decisions in this case, see 82 C. Cls. 135 and 299 U. S. 417.

JURISDICTION

The judgment of the Court of Claims sought to be reviewed was entered on January 6, 1941 (R. 39). A motion by petitioner for a new trial was allowed, and the findings and opinion were modified in a few particulars on May 5, 1941 (R. .

39-43). The petition for a writ of certiorari was filed August 5, 1941. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

QUESTIONS PRESENTED

Petitioner brought this suit in the court below to recover claims totaling \$1,183,204.48 (R. 2-8). The court held that the United States was liable to petitioner for \$18,388.30; that the United States was entitled to gratuity offsets of \$705,337.33; and that accordingly the complaint should be dismissed (R. 42, 39). The petition for certiorari seeks to have this Court reexamine numerous items involved in this complex account. Petitioner's contentions with respect to each of the controverted items are dealt with in the Argument.

STATUTES AND TREATIES INVOLVED

The pertinent portions of the treaties and statutes involved are set forth in the appendix in chronological order.

STATEMENT

A comprehensible statement of each of the many accounting details which underlie the decision below would expand this brief in opposition to a point which would defeat its purpose. The relevant facts, treaties, and statutes are extensively discussed in the findings (R. 8-20) and the

opinion (R. 21-43) of the Court of Claims: The Argument, below, indicates the relevant treaties and statutes, and summarizes the accounting details with particularity sufficient to show the nature of the questions presented by petitioner.

ARGUMENT

The judgment of the Court of Claims dismissing the petition and denying recovery is not in conflict with any decision of this Court or of any circuit court of appeals and presents no question of importance.¹ Furthermore, the judgment below is correct as to each of the items in controversy:

A. Item 1 (Fdg. 3) is a claim for \$61,563.42 based on the Government's promise in Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, to provide \$7,200 annually for ten years for the support of schools, for agricultural assistance, and for smiths and smith shops for the Seminole Nation. Although Congress annually made the necessary appropriations to fulfill this treaty obligation, only \$10,436.58 was actually expended for the purposes specified in the Treaty (R. 11). The

¹The mere fact that the court below, after the case had been remanded (299 U. S. 417) and more thoroughly briefed, reached a different conclusion (R. 21-42) from that which it had expressed in its first opinion in 1935 (82 U. Cls. 135) does not, as petitioner would seem to intimate (Pet. 12), warrant the issuance of a writ of certiorari. There is no "conflict" or "confusion" (cf. Pet. 6, 12); the later decision controls.

balance of \$61,563.42 was disbursed by the United States to feed and clothe loyal refugee and destitute Indians who were driven from their homes because of their loyalty to the Union during the Civil War (R. 12), the tribe itself having elected to support the Confederacy. Report of the Commissioner of Indian Affairs, 1863, pp. 21, 185.

These diversions, as the court below pointed out (R. 21-23), were authorized by statute. For example, the Resolution of February 22, 1862, No. 13, 12 Stat. 614, expressly authorized the Secretary of the Interior to use the annuities of the Seminoles, Creeks, Choctaws, and Chickasaws, for "the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes." Similar provisions are to be found in the Indian Appropriation Act of July 5, 1862, 12 Stat. 512, 528; the Indian Appropriation Act of March 3, 1863, 12 Stat. 774, 793; the Indian Appropriation Act of June 25, 1864, 13 Stat. 161, 180; and the Indian Appropriation Act of March 3, 1865, 13 Stat. 541, 562.

Even if such expenditures were not originally authorized, they have since been ratified by the Seminoles, and any claim for wrongful diversion of these trust funds was waived by the tribe in the Treaty of March 21, 1866, 14 Stat. 755, 759, which provides:

The stipulations of this treaty are to be a full settlement of all claims of said Semi-

nole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose; consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States. * * *

It follows that the court below rightly disallowed the claim for \$61,563.42.

B. Item 2 (Fdg. 5) is a claim for \$154,551.28 which is based on another provision in Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, namely, the Government's promise to establish a \$500,000.00 trust fund and to appropriate annually the interest therefrom (\$25,000.00) for *per capita* payments to members of the tribe. Petitioner contends that the United States failed to pay the full amount of the interest in certain years (the deficiency amounting to \$104,551.28) and that it mispaid the money (\$50,000.00) in 1908 and 1909.

Although Congress appropriated \$25,000.00 annually for each of the fiscal years in controversy (1867 to 1909), the findings show that the Government did in fact fail to make direct *per capita* disbursements of the entire appropriation in 1867-1874, 1876, 1879, and 1907; the underpayments for those eleven years amounting to \$104,551.28

(R. 13). But the findings also show (R. 13) that the direct *per capita* payments exceeded \$25,000.00 in five different years (1875, 1877, 1880, 1882 and 1883). These overpayments totaling \$12,127.54 should, of course, be deducted; petitioner does not contend to the contrary.

• There should likewise be deducted the interest (\$66,422.64) which was paid from this fund directly to the tribal treasurer during the period from 1870 to 1874. These payments were made at the request of the Seminole General Council for distribution to certain named members of the tribe (R. 13, 46-50). At the time these payments were made the plaintiff tribe conducted its affairs through its established tribal council. Since the payments were made at its request, the tribe is estopped to ask that these payments be made a second time. Cf. *The Sac and Fox Indians*, 220 U. S. 481.

Similarly, the Government is entitled to deduct the interest payments of \$62,500.00 expended by the United States Indian Agent in 1907, 1908, and 1909 for the Seminole Nation (R. 13).² Cf. *Creek*

² There is no formal finding that the United States Indian Agent actually disbursed the \$62,500.00 which was paid to him in 1907, 1908, and 1909. But the report of the General Accounting Office, which was filed as part of the record in this case and which has not been challenged by either party, shows that these monies were in fact expended by the Indian Agent for the benefit of the tribe, namely, for "per capita payments" and for "administrative expenses Seminole National Government" (pp. 308-310).

Nation v. United States, 78 C. Cls. 474, 493.

These payments were made to the Agent pursuant to the Act of April 26, 1906, 34 Stat. 137, 141, which expressly declared:

That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. * * *

Since these three offsets of \$12,127.54, \$66,422.64 and \$62,500.00 are properly deductible, it follows that petitioner's claim for \$154,551.28 was rightly reduced to \$13,501.10, the amount allowed by the court below (R. 23-25, 42).

C. Item 3 (Fdg. 6) is a claim for \$61,347.20 based on Article III of the treaty of March 21, 1866, 14 Stat. 755, in which the United States agreed to establish a \$50,000 trust fund, the interest therefrom (\$2,500) to be used annually for "the support of schools." The \$61,347.20 claim

is composed of three items: (1) \$3,097.20 for underpayments during the years 1867 to 1874; (2) \$57,500.00 representing 23 annual payments made to the Seminole Tribal Treasurer from 1875 to 1898, these payments having allegedly been made to that officer without authority of law; and (3) a \$750.00 payment made in 1907 to the United States Agent, this payment allegedly not being authorized by the Act of April 26, 1906, 34 Stat. 137, 141.

(1) The court below found, and the parties agree, that of the \$20,000 appropriated from 1867 to 1874, only \$16,902.80 was disbursed for the support of schools, and that accordingly \$3,097.20 is now due the Seminoles (R. 14, 26):

(2) But the Seminoles are not entitled to recover the \$57,500.00 which was actually paid to their tribal treasurer from 1875 to 1897 (R. 14). During that period the Seminoles had their own government and conducted their own schools. Under these circumstances the tribal treasurer was an entirely appropriate person to receive the interest payment for the support of schools. There was no requirement that the money be expended directly by the United States. And the evidence shows that at least \$2,500 was actually expended every year by the Tribe for school purposes (R. 25-26). It follows that the United States is not liable to the Seminoles for the \$57,500.00 which it paid to the tribal treasurer out

of the trust fund established by Article III of the 1866 treaty:

(3) Nor is the Government liable for the \$750.00 paid to the United States Agent in 1907, because that payment was fully authorized by the 1906 Act (*supra*, p. 7).

D. Item 4 (Fdg. 7) is a claim for \$9,068.24 based on the Government's promise in Article VI of the Treaty of March 21, 1866, 14 Stat. 755, to construct, "at an expense not exceeding ten thousand (\$10,000) dollars, suitable agency buildings" on the Seminole reservation. The record shows that in 1870 and 1872 \$931.76 was expended from general appropriations "for agency buildings and repairs" (R. 15). The record also shows that Congress in 1872 appropriated \$10,000 to fulfill this treaty obligation. Act of May 18, 1872, 17 Stat. 122, 132 (R. 14-15). Since only \$969.85 was returned to surplus, it is quite evident that \$9,030.15 was expended for some purpose, but for what purpose does not appear. (R. 15). However, it does appear from the Report of Commissioner of Indian Affairs for 1873 (pp. 211-212) that an agency building was erected on the Seminole Reservation in that year (R. 26-27). There

Petitioner contends that the 1873 Report merely shows that some sort of building was "in the process of being constructed" (Pet. 22). The Report reads as follows:

"Since the agency building was commenced, the 10th of July, some dissatisfaction has been produced, because all

is no showing by the plaintiff that this was not a "suitable" building. Inasmuch as Article VI provided merely for the erection of "suitable agency buildings," "at an expense not exceeding ten thousand (\$10,000) dollars," it follows that there has been no violation of this provision of the 1866 treaty.

E. Item 5 (Edg. 8), is a claim for \$864,702.58 arising out of the Government's alleged wrongful payment of that sum to the tribal treasurer, petitioner's contention being that Section 19 of the Curtis Act of June 28, 1898, 30 Stat. 495, forbade any further payments directly to the tribe or its officers. But Section 19 had no such effect. *Choctaw Nation v. United States*, 91 C. Cls. 320, certiorari denied 312 U.S. 695. It merely prohibited payments to tribal officers "for disbursement," that is, payments for *per capita* distribution. Payments for tribal purposes could still be made to the tribal treasurer. This is the plain implication of the language of the Act and, as the court below pointed out, this construction finds support in the Act's legislative history (R. 29-30).

who made application did not obtain employment, and those who did obtain it appear sorry that their labor is *about ended there, the building being now nearly finished.* [*Italics supplied.*]

This statement, coupled with the fact that \$10,000 was appropriated for an agency building and that \$9,030.15 thereof was actually expended for some purpose, amply supports the court's finding that a building "was erected" (R. 27).

While it is true that \$212,500 of the \$864,702.58 claim represents monies paid to the tribal treasurer for *per capita* distribution to the Indians in violation of Section 19 of the Curtis Act, the passage of this Act did not create any vested rights in the individual Indians. Nor did the statute amount to an agreement with the tribe for the benefit of its individual members. It was merely a direction to the agents of the United States, which Congress could change at will. *The Sac and Fox Indians*, 220 U. S. 481. Admittedly, the Tribe received the money; in fact, the money was paid to the tribal treasurer pursuant to a request of the General Council (R. 15). As the court below said (R. 30): "Plainly * * * the Nation cannot maintain an action for the payment of it a second time."

F. Petitioner attacks the decision below, not only because of the court's denial of a number of the claims alleged in the complaint, but also (Pet. 41-55) because of the court's action in allowing gratuity offsets totaling \$705,337.33 (R. 42). These offsets, allowed under the Act of August 12, 1935, 49 Stat. 571, 596, are explained in detail in the findings (Nos. 9-19, R. 16-20) and in the opinion of the court below (R. 30-39, 41-43). It would serve no useful purpose to examine the offsets again here, item by item, since petitioner concedes that the Government is entitled to offsets far in excess of \$18,388.30, the

amount found to be due the tribe.* This concession, without more, justifies the judgment dismissing the complaint and denying recovery (R. 39).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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SEPTEMBER 1941.

* For example, the \$31,083.79 in finding 9 (R. 16) is admittedly a proper offset (R. 30). Similar concessions have been made as to other items (R. 33, 35, 37).

APPENDIX

Article VIII of the Treaty with the Creeks and Seminoles of August 7, 1856, 11 Stat. 699, 702:

The Seminoles hereby release and discharge the United States from all claims and demands which their delegation have set up against them, and obligate themselves to remove to and settle in the new country herein provided for them as soon as practicable. In consideration of such release, discharge, and obligation, and as the Indians must abandon their present improvements, and incur considerable expense in reestablishing themselves, and as the government desires to secure their assistance in inducing their brethren yet in Florida to emigrate and settle with them west of the Mississippi River, and is willing to offer liberal inducements to the latter peaceably so to do, the United States do therefore agree and stipulate as follows, viz: To pay to the Seminoles now west, the sum of sixty thousand dollars, which shall be in lieu of their present improvements, and in full for the expenses of their removal and establishing themselves in their new country; to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums to be applied to these objects in such manner as the President shall direct. Also

to invest for them the sum of two hundred and fifty thousand dollars, at five per cent. per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west. Whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse law.

Resolution of February 22, 1862, No. 13, 12 Stat. 614:

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

Pertinent provisions of the Indian Appropriation Act of July 5, 1862, 12 Stat. 512, 528:

For defraying the expenses of the removal and subsistence of Indians in Oregon and Washington Territory (not parties to any treaty) and for pay of necessary employees, fifty thousand dollars: *Provided*, That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: *Provided, further*, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. * * * *And provided, further*, That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

Section 3 of the Indian Appropriation Act of March 3, 1863, 12 Stat. 774, 793:

SEC. 3. *And be it further enacted*, That the Secretary of the Interior be, and he is hereby authorized to expend such part of the amount heretofore appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as may be found necessary to enable such individual members of said tribes as have been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they can be removed to their homes, and to assist them in such removal. * * *

Section 2 of the Indian Appropriation Act of June 25, 1864, 13 Stat. 161, 180:

SEC. 2. *And be it further enacted*, That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount herein appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom, shall be in a state of actual hostility to the government of the United States, including the Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as well as the Cherokees, as may be found necessary to support such individual members of said tribes as have been driven from their homes or reduced to want on account of their friendship to the United States, and enable them to subsist

until they can support themselves in their own country: * * *

Section 5 of the Indian Appropriation Act of March 3, 1865, 13 Stat. 541, 562.

SEC. 5. *And be it further enacted*, That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount herein appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as well as the Cherokees, as may be found necessary to support such individual members of said tribes as have been driven from their homes or reduced to want on account of their friendship to the United States, and enable them to subsist until they can support themselves in their own country: * * *

Treaty with the Seminole Indians of March 21, 1866, 14 Stat. 755:

ARTICLE III. * * * the United States agree to pay, in the following manner, to wit: Thirty thousand dollars shall be paid to enable the Seminoles to occupy, restore, and improve their farms, * * * seventy thousand dollars to remain in the United States treasury, upon which the United States shall pay an annual interest of five per cent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of

the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

ARTICLE VI. Inasmuch as there are no agency buildings upon the new Seminole reservation, it is therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (\$10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be *directed* [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

ARTICLE VIII. The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made

from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

Pertinent provisions of the Deficiency Appropriation Act of May 18, 1872, 17 Stat. 122, 132:

For this amount, to replace the sum appropriated by the act of July twenty-eighth, eighteen hundred and sixty-six, under the provision of the sixth article of treaty with the Seminoles of March twenty-first, eighteen hundred and sixty-six, and ninth article of the treaty with the Creeks of June fourteenth, eighteen hundred and sixty-six, for the erection of agency buildings on the reservations of said tribes, twenty thousand dollars.

Curtis Act of June 28, 1898, 30 Stat. 495, 503:

SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior, by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

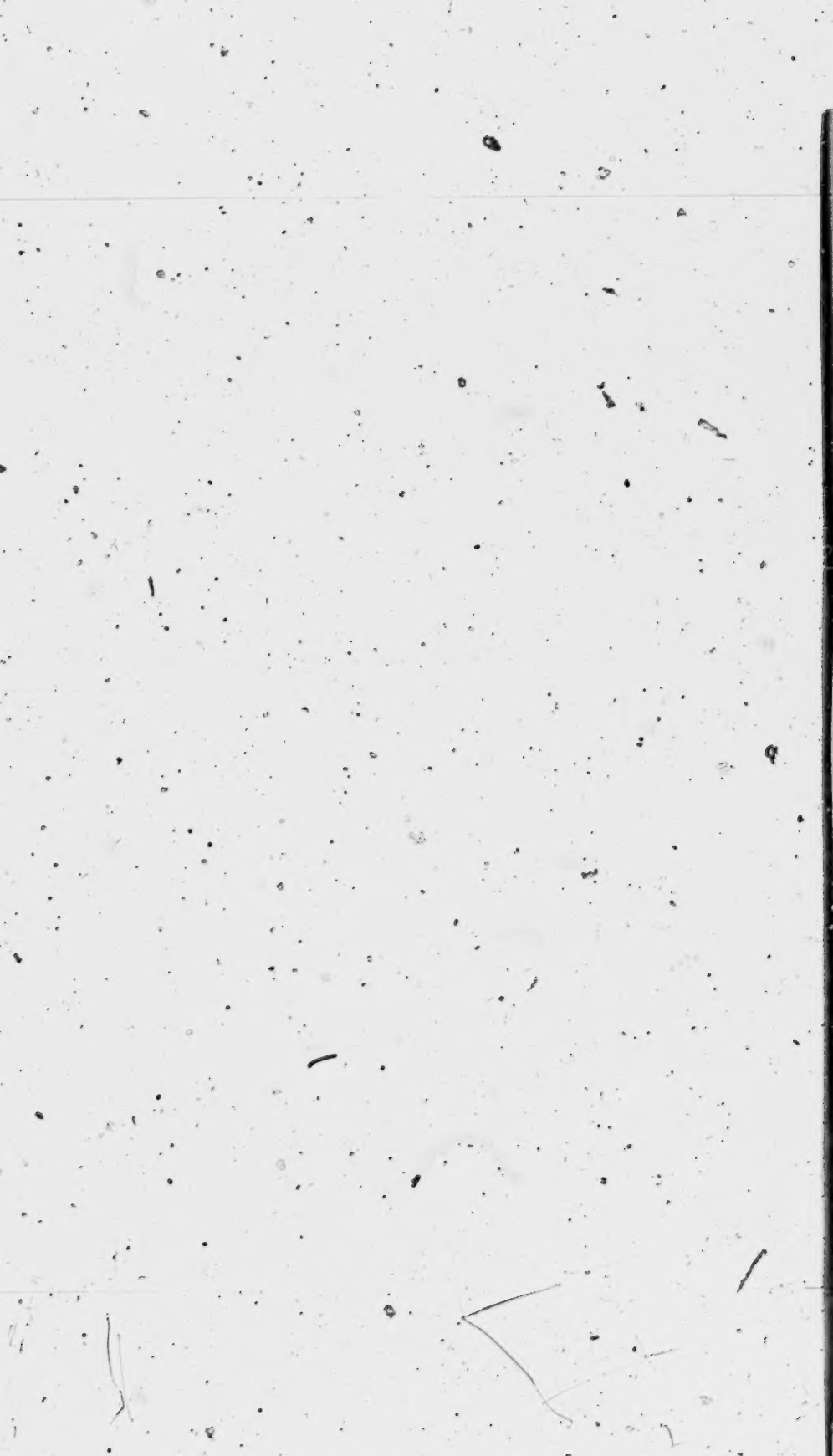
Section 11 of the Act of April 26, 1906, 34 Stat. 137, 141:

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. * * *

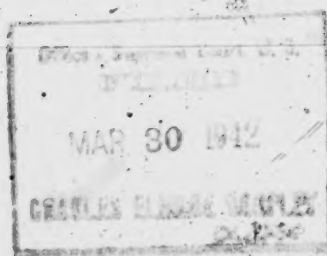
Section 2 of the Act of August 12, 1935, 49 Stat. 571, 596:

SEC. 2. In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Court of Claims in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended

by the United States gratuitously for the benefit of the said tribe or band: *Provided*, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; * * * *Provided further*, That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *



FILE COPY



No. 7348

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF HABEAS CORPUS TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (R. 21-39), as modified on motion for a new trial (R. 39-42), is reported in 93 C. Cls. 500. Decisions at earlier stages of this litigation are reported in 82 C. Cls. 135 and 299 U. S. 417.

JURISDICTION

The judgment of the Court of Claims was entered on January 6, 1941 (R. 39). The court allowed a motion by petitioner for a new trial, and on May 5, 1941 modified its findings and opinion (R. 39-43). The petition for a writ of certiorari was filed August 5, 1941; it was granted October

13, 1941 (R. 74). The jurisdiction of this Court rests on section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939, 53 Stat. 752 (U. S. C., title 28, sec. 288 (b)).

QUESTIONS PRESENTED

1. Whether the Government is liable to the Seminole Nation on account of the diversion to loyal refugee Indians during the Civil War of payments due under Article VIII of the Seminole Treaty of 1856.

2. Whether the payment of per capita annuities, due under Article VIII of the same treaty, to the tribal treasurer and Seminole creditors pursuant to resolution of the Seminole General Council discharged the obligation of the United States.

3. Whether similar payments made to the United States Indian Agent for the Seminoles pursuant to statute and disbursed by him for proper purposes created a valid claim in the Seminole Nation.

4. Whether payments for the support of schools, under Article III of the Seminole Treaty of 1866, was properly made to the tribal treasurer.

5. Whether the United States has discharged its obligation under Article VI of the same treaty to construct suitable agency buildings at a cost not exceeding \$10,000.

6. Whether section 19 of the Curtis Act prohibited payments by the Government to the tribal treasurer, totalling \$864,702.58, during the fiscal years 1899 to 1907; and, if so, whether the tribe

thereby acquired any right of action against the United States.

7. Whether, if the Government's obligations with respect to the affirmative claims of petitioner were not discharged *pro tanto* by corresponding payments made by the United States in attempted satisfaction of the claims, the amounts of those payments are allowable as gratuity offsets in favor of the Government.

8. Whether numerous other sums of money spent by the Government were expended gratuitously for the benefit of the Seminoles and were properly allowed by the Court of Claims as gratuity offsets.

STATUTES INVOLVED

The relevant provisions of the statutes and treaties involved in this case are set forth in chronological order in the Appendix, which is printed under separate cover.

STATEMENT

The Seminole Nation filed its original petition in this case on February 24, 1930, seeking recovery of trust funds alleged to have been wrongfully expended by the United States since July 1, 1898 (R. 1). In 1934 the petition was amended to include additional claims against the United States: recovery was asked for funds alleged to have been wrongfully expended before as well as after July 1, 1898, and for moneys alleged to have been wrongfully withheld under numerous trea-

ties and statutes dating back to 1856. These claims, thirteen in number and totalling \$1,746,013.23, were examined by the court below, which rendered a judgment in 1935 (82 C. Cls. 135, 144) holding the United States liable to the Seminoles for ten items¹ totalling \$1,317,087.27. The Government sought certiorari as to seven items (\$1,307,478.02), raising jurisdictional objections against the consideration of six, and objections on the merits against all seven. The writ was granted (299 U. S. 526).

On its review of the case this Court agreed with the Government that the judgment as to six items (\$1,153,022.72) was improper for want of jurisdiction in the Court of Claims (299 U. S. 417, 421-427): these items had been advanced by petitioner for the first time in its amended petition filed in 1934, long after the expiration of the period of limitation prescribed by the special jurisdictional Act of May 20, 1924, 43 Stat. 133, as amended by the Joint Resolution of February 19, 1929, 45 Stat. 1229. As to the merits of these six claims this Court expressed no opinion. On examining the merits of the seventh item (\$154,455.30) this Court disallowed the claim except to the extent of \$490.20 (299 U. S. 417, 431). The judgment of the Court of Claims as to all seven items was accordingly re-

¹ Three of the thirteen claims were disallowed in their entirety while three others were disallowed in part.

versed. *United States v. Seminole Nation*, 299 U. S. 417, 432.²

The jurisdictional barrier was subsequently removed by the Act of August 16, 1937, 50 Stat. 650, which conferred jurisdiction on the Court of Claims to reinstate and retry on their merits claims previously dismissed because set up by amended petition after the expiration of the time limit fixed in the original jurisdictional acts. The Seminole Nation accordingly filed a second amended petition on November 8, 1937 (R. 2), reasserting the six claims (for \$1,153,022.72) which had been denied by this Court on jurisdictional grounds.

At the second trial of the case, the Court of Claims reexamined these six items in the light of arguments made by the Government on the merits when the case was first in this Court, and as a result disallowed three items (\$935,334.24) in their entirety (R. 25, 26, 27), allowed one in full (\$1,790.00) (R. 41), and allowed the other two (\$215,898.48) in part (\$16,598.30) (R. 38).

² On remand to the Court of Claims judgment was entered in the sum of \$10,099.25 (R. 2, 21; 85 C. Cls. 699); this sum was intended to include the \$490.20 which this Court had allowed on the \$154,455.30 claim, and the three small items (\$9,609.25) which the Government had not questioned in its petition for certiorari. These four items totalled \$10,099.45; entry of judgment by the court for an amount falling \$.20 short of this figure is attributable to an inadvertent error of petitioner in its motion for judgment on March 20, 1937, in the Court of Claims (R. 2).

Against the sum of these claims thus sustained (\$18,388.30), the Government was allowed gratuity offsets of \$705,337.33 (R. 42) under the Act of August 12, 1935, 49 Stat. 571, 596. Since the offsets exceeded the amount due petitioner, the Court of Claims ordered the second amended petition dismissed (R. 39).

In the petition for certiorari and in its brief on the merits, the Seminole Nation challenges the correctness of the decision below on each of the five claims which were disallowed in whole or in part (Pet. 14-41; Br. 14-42) and as to numerous items which the court included in its list of gratuity offsets (Pet. 41-55; Br. 42-86). Petitioner's contentions concerning each claim and item of gratuity, the material treaty or statutory provisions, and the accounting details which underlie each are set forth and analyzed in the Argument.

SUMMARY OF ARGUMENT

I

The United States was bound by treaty to provide the Seminole Nation with \$7,200 annually for ten years from 1857 to 1866, for the support of schools, agricultural assistance, and blacksmiths and shops. Congress regularly appropriated sufficient funds to discharge this obligation. \$10,436.58 was spent for the purposes specified in the treaty; the balance was disbursed for the benefit of refugee Indians who had remained loyal to the United States during the Civil War and had on that account been driven from their homes. The act of the

Seminole Nation in joining the Confederacy during 1861 would have warranted a complete abrogation of the treaty by the United States. Diversion of the balance of the \$72,000 from treaty purposes was therefore validly authorized by statutes enacted in the years 1862 to 1866. In any event, the diversions were subsequently ratified by the Seminole Nation in a treaty with the United States; and if the diversions were neither authorized nor ratified, amounts spent on loyal refugee Seminoles must be allowed as gratuity offsets under the Act of August 12, 1935.

II

Under other treaty provisions the United States was obligated to establish a \$500,000 trust fund for the Seminoles and use the interest for per capita payments to members of the Nation. Sufficient annual appropriations were made by Congress, but in disbursement there was an underpayment of \$92,051.28, and \$62,500 was paid to the United States Indian Agent for the Seminole Nation instead of to the Seminoles directly. The Nation now asserts a claim for these sums. However, the Government made overpayments in five years, totalling \$12,127.54. Payments of \$66,422.64 were made to the tribal treasurer and creditors of the Seminoles during the years of alleged underpayment, pursuant to resolutions adopted by the Seminole governing body. The \$62,500 payment to the Seminole Agent was authorized by statute, and the money was ultimately expended for proper

purposes. The Government should therefore receive a credit of \$141,050.18 against petitioner's claim for \$154,551.28 on this item, and the court below correctly reduced the amount of liability here to \$13,501.10.

III

By a later treaty the United States was bound to pay \$2,500 interest annually on a \$50,000 trust fund for Seminole schools. From 1867 to 1874 there was a total deficiency of \$3,097.20 in payments. From 1875 to 1898 the installments, totalling \$57,500, were paid to the tribal treasurer instead of being expended directly for school purposes. In 1907 a payment of \$750 was made on this account to the Indian Agent. The Government concedes the underpayment of \$3,097.20, found by the court below. However, the amounts paid to the Seminole treasurer discharged *pro tanto* the Government's obligation, since the treasurer was a proper person to receive the \$57,500 and appears to have expended it in support of schools. The payment of \$750 to the Seminole Agent was also authorized (see Point II). The United States, then, is liable to petitioner on this claim for only \$3,097.20.

If the payments made by the United States here with respect to schools and in Point II with respect to per capita annuities did not discharge the Government's corresponding obligations, they should nevertheless be allowed as gratuity offsets under the statute of 1935.

IV

The Government's treaty obligation to construct suitable agency buildings at a cost not exceeding \$10,000 has been fully discharged by the expenditure of \$931.76 for the purpose in 1870 and 1872 and by the construction in 1873 of a building which the evidence indicates was paid for by the expenditure of \$9,030.15 out of an appropriation of \$10,000 made by Congress for the treaty purpose.

V

Petitioner contends here that varied treaty and statutory payments were made improperly by the United States to the Seminole treasurer from 1898 to 1907, because of the prohibition contained in section 19 of the Curtis Act. The Government, however, urges that section 19 applied only to payments for disbursement to individual Seminoles; both the language and legislative history of the statute require this construction. None of the payments here involved was for disbursement. Even if the interpretation contended for by petitioner be accepted, section 19 would not govern since the Curtis Act was immediately superseded by the Seminole agreement of 1897 (ratified July 1, 1898), the provisions of which are inconsistent with section 19. The consistent administrative practice from the enactment of the Curtis Act has regarded its provisions as not prohibiting the payments in question to be made to the tribal treasurer. In any

event, the Seminole Nation has no standing to complain of a violation of section 19 since it conferred no rights of action, and constituted only a direction to Government officers; further, the Seminole Nation may not complain of payments made at its request to the tribal treasurer, since the payments were made pursuant to resolutions of the Seminole General Council; and no injury to the tribe or to individual Seminoles as a result of the alleged mispayments is shown by petitioner. If the payments were not held to discharge the several obligations of the Government to which they refer, they would constitute gratuity offsets under the 1935 statute.

VI

The court below found that the United States has expended over \$700,000 gratuitously for the benefit of the Seminole Nation, and that the Government was entitled to offset these amounts against the Seminole claims. Petitioner challenges numerous items among these allowed offsets. The Government suggests that it is unnecessary for this Court to examine the merits of petitioner's contentions concerning those expenditures: we have urged that the Court of Claims correctly determined the total liability of the United States to be \$18,388.30, and petitioner admits that the Government has proper offsets considerably in excess of that figure. Accordingly, the judgment of the court below dismissing the petition could be

affirmed without consideration of the items of gratuity offset.

If, however, the Court should reverse the decision below on petitioner's affirmative claims (at the same time determining that the amounts expended by the United States in attempted satisfaction of the corresponding obligations are not allowable as gratuity offsets), it would still not be required presently to consider the offset items allowed below. In that event the case should be remanded to the Court of Claims to liquidate the Government's liability and to find and designate the precise gratuity expenditures to be offset. Such a procedure would be desirable since the exact items of gratuity expenditure exhausted to satisfy the present Seminole claims would stand ascertained for future suits and since this Court would thereby not be required now to pass on the merits of all the gratuity items regardless of the Government's need for them as offsets.

VII

However, to provide for the contingency that the Court should find it necessary to examine the items of gratuity offset on this review, the Government in this Point discusses the findings of the Court of Claims concerning gratuity expenditures. As the items are very numerous they are detailed in the Argument, and no attempt to summarize them is made here.

The general statute concerning offsets against Indian claims under which the Court of Claims allowed the offsets in the present case was patterned after similar provisions in earlier individual jurisdictional acts. Those provisions had been construed by the Court of Claims when Congress enacted the statute of 1935, and the judicial interpretations were called to the attention of Congress during its consideration of the general offset provision. Many of the items of gratuity expenditure here contested are entirely similar to those earlier allowed as offsets by the Court of Claims under the special jurisdictional statutes. We think also that the other items, with minor exceptions noted in the course of the Argument, were properly classed as gratuity offsets, since the sums in question were spent gratuitously by the United States for the benefit of the Seminoles.

ARGUMENT

I

THE GOVERNMENT IS UNDER NO FURTHER LIABILITY ON ACCOUNT OF ITS PROMISE IN ARTICLE VIII OF THE TREATY OF 1856 TO PROVIDE THE SEMINOLE NATION WITH \$7,200 ANNUALLY FOR TEN YEARS FOR THE SUPPORT OF SCHOOLS, FOR AGRICULTURAL ASSISTANCE, AND FOR SMITHS AND SMITH SHOPS

Item 1 (Fdg. 3, R. 11-12; Opinion, R. 21-23; Br. 14-19) is a claim for \$61,563.42 based on the Government's promise to the Seminole Nation in

Article VIII of the Treaty of August 7, 1856, 11 Stat. 699,702—

* * * to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops * * *, said sums to be applied to these objects in such manner as the President shall direct.

During each of the ten years covered by this article (fiscal years 1858 to 1867, inclusive), Congress regularly made the necessary appropriations to discharge this obligation (\$72,000.00 in all), but only \$10,436.58 was actually expended for the purposes specified in the treaty (Fdg. 3, R. 11-12). The balance (\$61,563.42) was disbursed by the United States prior to June 30, 1866, for the purpose of clothing and feeding refugee and destitute Indians who had been driven from their homes during the Civil War on account of their loyalty to the Union (Fdg. 3, R. 12). It is petitioner's contention that the Seminole Nation should recover the money thus diverted.

To this claim the Government interposes three defenses: (a) that the diversion was authorized by the Resolution of February 22, 1862, and by the Indian appropriation acts for the fiscal years 1863, 1864, 1865, and 1866; (b) that the diversion was ratified by the treaty of March 21, 1866, 14 Stat. 755, 759; and (c) that, if these defenses are

not sustained, the amount expended in feeding and clothing loyal Seminole refugees must be allowed as a gratuity offset under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596.

A. THE DIVERSION OF \$61,563.42 FOR FEEDING AND CLOTHING LOYAL REFUGEE INDIANS WAS AUTHORIZED BY THE RESOLUTION OF FEBRUARY 22, 1862, AND BY THE INDIAN APPROPRIATION ACTS FOR THE FISCAL YEARS 1863-1866

1. The United States relies first upon the Resolution of February 22, 1862, 12 Stat. 614, which provides:

That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

That Congress had power to authorize the diversion of these annual payments to other purposes seems clear under well-established principles of international law. The Seminole Nation had joined the Confederacy on August 1, 1861.³ By reason of this hostile act Congress could have de-

³ See preamble to Treaty of March 21, 1866, 14 Stat.

clared the Treaty of 1856 between the United States and the Nation to be at an end. See *Karnath v. United States*, 279 U.S. 231, 236-237, 241; 2 Hyde, *International Law* (1922) 94.⁴ A *fortiori* Congress could take appropriate steps to withhold the sinews of war from the disloyal tribes and to use the moneys for supporting individual Indians who remained loyal to the Union.⁵

⁴ It is noteworthy that the preamble to the Treaty of March 21, 1866, 14 Stat. 755 (reestablishing relations with the Seminoles), recites: "Whereas the Seminole nation made a treaty with the so-called confederate states, August 1st, 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States." See also Article IX of that Treaty which makes it clear that the United States, in reaffirming and reasserting certain prior treaty obligations, agreed to renew only those "payments of annuities accruing by force of said treaty stipulations, from and after the close of the present fiscal year [June 30, 1866]." See 2 Hyde, *op cit. supra* 95.

⁵ That these considerations presented themselves to Congress when it authorized diversions of the treaty payments is evidenced by a statement of Senator Doolittle in debate on the Indian appropriation bill for the fiscal year 1863, which contained a proviso similar to the Resolution of February 22, 1862. He said (Cong. Globe, 37th Cong., 2d sess., pt. 3, p. 2125): "I have no doubt that in our relations with the Indian tribes they are under our Constitution to be regarded by us the same as foreign nations; at all events we treat with them as such. We can hold on to any money in our hands which is going to them as to a foreign nation or a nation distinct from ourselves. If for any reason we are satisfied that they have violated their treaty with us, and if they are at war with us, we can withhold that money; and more than all that, it is perfectly within our power to take the

There is no warrant for petitioner's suggestion (Br. 15, 18) that the Government is endeavoring to construct out of the events of the Civil War an excuse for breaches of treaty obligations which occurred prior to the war. Up to the time the Seminoles joined the Confederacy Congress had appropriated funds (\$36,000.00 in all) to fulfill the Government's obligations through the fiscal year ending June 30, 1862.* It is true that not all of this money had been spent by August 1, 1861, when the Seminole Nation became allied with the Confederate States.⁷ But the mere fact that there was an unexpended balance on hand at the outbreak of the war did not mean that the treaty had been breached. While under Article VIII the

money which would go to them if they had remained loyal, and expend that money upon those who are loyal. I have no doubt about that, and that is the proposition of the Senator from Ohio."

* Acts of March 3, 1857, 11 Stat. 169, 175; May 5, 1858, 11 Stat. 273, 282; February 28, 1859, 11 Stat. 388, 398; June 19, 1860, 12 Stat. 44, 54; March 2, 1861, 12 Stat. 221, 230.

⁷ The Court of Claims did not find how much the Government spent for treaty purposes in each year. It simply found that a total of \$10,436.58 was expended for treaty purposes (R. 11), and that the balance of \$61,563.42 was disbursed prior to June 30, 1866, for clothing and feeding loyal Indians. However, the report of the General Accounting Office, which was a part of the record in the lower court, shows (pp. 148, 150) that \$3,239.08 had been spent for treaty purposes up to August 1, 1861. The report also shows (pp. 150-151) that after the resumption of treaty obligations (see n. 4, p. 15, *supra*) \$7,197.50 of the \$7,200.00 appropriated for the fiscal year 1867 was spent for treaty purposes. These portions of the report are set out in the Appendix, pp. 62-63.

United States was to make a total of \$7,200.00 available each year; the treaty contained no requirement that the money was to be spent within the year. It simply provided that the annuity was to be applied "in such manner as the President shall direct." Accordingly, it is submitted that there had been no breach of the treaty prior to the war. Upon the commencement of hostility between the United States and the Seminole Nation, any obligation of the Government to make payments from previous appropriations ceased, for, with respect to paying subsidies to the Seminoles during war, there could be no rational distinction between the sums agreed in the treaty to be made available before 1861 and those to be made available after.

From the language of the Resolution of February 22, 1862, it is not certain that the diversion of annuities payable in succeeding years was thereby authorized.* But a strong argument is presented for holding that it did in the fact that the resolution was not part of any particular appropriation act but was an independent statutory provision applicable to a situation which continued throughout the Civil War period and until treaty relations were fully resumed on July 1, 1866.

*The terms of the resolution, set out at p. 14, *supra*, make apparent that diversion of annuities payable before 1862 was included in its scope.

2. However, whether the resolution just considered furnishes a total or only a partial defense to the United States against petitioner's claim of annuities for the years from 1858 to 1866 is not controlling in view of provisions contained in the regular appropriation acts for the fiscal years 1863 to 1866. For example, the following three provisos appear in the Indian appropriation act of July 5, 1862, c. 135, 12 Stat. 512, 528:

* * * *Provided*, That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: *Provided, further*, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. * * * *And provided, further*, That in cases where the tribal organization

of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

This act conferred three distinct powers on the President: (1) he might suspend or postpone any appropriations theretofore or thereafter made in favor of tribes which were in a state of actual hostility to the Government; (2) he might expend, for the benefit of loyal refugee Indians, such part of the amount which had theretofore been appropriated and not expended and which was thereinbefore appropriated for the Seminoles and the other named tribes; and (3) he might, by proclamation, declare certain Indian treaties abrogated.

Petitioner urges (Br. 15-16) that the act could not become operative without action by the President pursuant to the first proviso, and since no such action is shown diversions under the second proviso were unauthorized.* We think, on the other hand, that the statute did not intend the execution of any formalities under the first pro-

* The Seminole Nation cites (Br. 15), in support of its contention that the President refused to act under the first proviso, Abel, *American Indian Under Reconstruction* (1925) 251-252, notes 496-497. This reference, however, shows only that President Lincoln declined to issue a proclamation pursuant to the third proviso declaring abrogated certain treaties with the Cherokees.

viso as a prerequisite to action by the President under the second, and that diversion of appropriated moneys pursuant to this latter proviso operated to suspend automatically the payment of corresponding amounts to the tribes.

Similar authority is to be found in the Indian appropriation acts for the fiscal years 1864, 1865, and 1866,¹⁰ with the difference that those last three acts expressly authorize the diversion to be made by the Secretary of the Interior.¹¹ It is submitted that complete authority for the diversion of the \$61,634.42 is found in the provisions of these four appropriation acts.¹²

¹⁰ Indian Appropriation Act of March 3, 1863, c. 99, sec. 3, 12 Stat. 774, 793; the Indian Appropriation Act of June 25, 1864, c. 148, sec. 2, 13 Stat. 161, 180; Act of March 3, 1865, c. 127, sec. 5, 13 Stat. 541, 562.

These statutes contain provisions equivalent to only the second proviso in the act of 1862.

¹¹ The actual diversions under all of the statutes were made by the Secretary of the Interior; the legality of this procedure with respect to the appropriation act of 1862 is not open to question since the acts of heads of executive departments are considered as the acts of the President. *Chicago, Mil. & St. P. Ry. v. United States*, 244 U. S. 351, 357; cf. *The Sac and Fox Indians*, 220 U. S. 481, 484; see *Hegler v. Faulkner*, 153 U. S. 109, 117.

¹² The Act of July 5, 1862, covered not only appropriations for the fiscal year 1863 but also covered all moneys theretofore appropriated and not expended. See n. 8, p. 17, *supra*. The other acts covered the fiscal years 1864 through 1866. The money appropriated for the fiscal year 1867 was expended for treaty purposes (except for a shortage of \$2.50). See n. 7, p. 16, *supra*.

R. THE DIVERSION OF \$61,563.42 FOR FEEDING AND CLOTHING LOYAL REFUGEE INDIANS WAS RATIFIED BY THE TREATY OF MARCH 21, 1866, 14 STAT. 755

Even if the expenditure of \$61,563.42 from the Seminole appropriations in order to feed and clothe loyal refugee Indians was not authorized by the statutes already discussed, the diversion was ratified by the Seminole Nation in Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759:

The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

The first sentence of this article, it will be noted, contains a general release by the Seminole Nation of all claims against the United States "for damages and losses of every kind growing out of the late rebellion,"¹³ and a specific release of all claims based on "expenditures by the United States of annuities in clothing and feeding refugee and destitute [Seminole and other] Indians * * * ." ¹⁴ The second sentence of the article

¹³ It has been shown at pp. 16-17, *supra*, that the United States had fulfilled its treaty obligations up to the time the Seminoles joined the Confederacy. Accordingly, there is no foundation for petitioner's contention (Br. 18) that the claims here involved were not for damages and losses growing out of the war, since their basis and cause, respectively, were the diversions.

¹⁴ Although the treaty of 1856 did not denominate the annual provision of \$7,200.00 here in question an "annuity", there is no reasonable doubt that this fixed annual sum was embraced in the term as used by the parties in the first sentence of Article VIII. Cf. *Peck v. Kinney*, 143 Fed. 76, 80 (C. C. A. 2d); *Bacon v. Commissioner*, 266 Mass. 547, 549; *Harland v. Damon's Estate*, 103 Vt. 519, 531. Nor do we understand petitioner to controvert this position. In fact, payments very similar to those provided for in Article VIII of the Treaty of 1856 have often been referred to in treaties and statutes by the term "annuity". E. g., the following treaties: *Seminoles*, 1832, Article IV, 7 Stat. 368, 369 ("annuity for the support of a blacksmith"); *Creeks and Seminoles*, 1845, Article IV, 9 Stat. 821, 822 ("additional annuity of three thousand dollars for purposes of education"); *Choctaws*, 1825, Article II, 7 Stat. 234, 235 (\$6,000.00 to be annually applied for 20 years "to the support of schools," "said annuity" thereafter to be invested in stocks, etc.); *Oto and Missouri Tribes*, 1835, Article III, 7 Stat. 429, 430 (continuation of \$500.00 annuity "for instruments for agricultural

states that "the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole Nation by the United States." In return the Government promised that it would not use tribal annuities after June 30, 1866, for feeding and clothing refugee Indians, other than Seminoles.

Petitioner argues (Br. 17-18) that Article VIII does not cover the diversions in question because they were made "from funds of the United States, and not from funds of the Seminole Nation." In view of the broad purpose of the Treaty of 1866 to adjust all differences between the United States and the Seminoles which arose out of the Civil War, a construction would seem unjustifiably narrow which limited "diversions of annuities heretofore made from the funds of the Seminole Nation" to only the diversions of per capita interest payments made by the Treasury pursuant to another provision of the treaty of 1856 and excluded diversions of the annuities here involved. In any event, the releases contained in the first sentence of Article VIII of the Treaty of 1866 are effective independently of the ratification contained in the second sentence, and the second release in the first sentence is not qualified by any

purposes"); statutes: Act of August 18, 1856, 11 Stat. 65, 66 (annuity for instruction of Blackfeet in "agricultural and mechanical pursuits"); *id.* at 69 ("permanent annuity for support of light-horsemen"); *id.* at 76 ("permanent annuity for educational purposes"); *id.* at 77 ("annuity for beneficial objects").

requirement that the annuities there referred to be "funds of the Seminole Nation."

C. THE AMOUNT EXPENDED IN CLOTHING AND FEEDING REFUGEE SEMINOLE INDIANS IS IN ANY EVENT A GRATUITY OFFSET UNDER THE 1935 INDIAN CLAIMS OFFSET STATUTE

As a third defense we wish to point out that if this Court holds that the Government is liable to the Seminole Nation for the \$61,563.42 diverted during the Civil War because the expenditure of \$61,563.42 on loyal Indians was neither authorized nor ratified and consequently did not discharge the Government's obligation under the 1856 Treaty then the United States in this case is entitled to a gratuity offset under section 2 of title I of the Act of August 12, 1935, 49 Stat. 571, 596, for the amount actually spent in feeding and clothing refugee Seminole Indians.¹⁵

H

PETITIONER'S CLAIM FOR \$154,551.28 FOR NONPAYMENT AND MISPAYMENT OF INTEREST ACCRUING FROM THE \$500,000 TRUST FUND ESTABLISHED UNDER ARTICLE VIII OF THE TREATY OF 1856 WAS RIGHTLY REDUCED TO \$13,501.10

Item 2 (Fdg. 5, R. 12-13; Opinion, R. 23-25; Br. 19-22) is a claim for \$154,551.28 based on another provision in Article VIII of the Treaty of

¹⁵ Since the court below held that the Government was not liable, it had no occasion to consider whether any part of the \$61,563.42 was a gratuity offset. Therefore, the present findings do not disclose the exact amount spent on Seminoles as distinguished from other refugees. To make such a determination a remand would be necessary.

August 7, 1856, 11 Stat. 699, 702, namely, the Government's promise to establish a \$500,000.00 trust fund (originally two funds of \$250,000.00 each), the annual interest therefrom (\$25,000.00) to be used for per capita payments to members of the Seminole Nation. Although Congress appropriated \$25,000.00 annually for each of the fiscal years in controversy (1867-1898, 1907-1909),¹⁶ the findings show that the Government did in fact fail to make direct per capita disbursements of a portion of the money appropriated in 1867-1874, 1876, and 1879, the underpayments for those ten years amounting to \$92,051.28 (R. 13), and that one-half of the appropriation in 1907 and the entire appropriation in 1908 and 1909 (\$62,500.00 in all), instead of being paid directly to the Seminoles, was paid to the United States Indian Agent for the Seminole Nation (R. 13). On the basis of these underpayments and alleged mispayments petitioner contends that \$154,551.28 is still due the tribe.

Against this claim of \$154,551.28 the Government has interposed three set-offs, consisting of (a) overpayments of \$12,127.54 made in 1875, 1877,

¹⁶ Alleged mispayments to the tribal treasurer during the years 1898 to 1907 are not included in item 2. They constitute, instead, a part of item 5 (*infra*, pp. 35-64), a general claim for the recovery of all moneys (\$864,702.58) paid to the tribal treasurer from 1898 to 1907, it being petitioner's contention that payments to that officer during those years were interdicted by section 19 of the Curtis Act of June 28, 1898, 30 Stat. 495.

1880, 1882, and 1883; (b) payments of \$66,422.64 which were made pursuant to requests of the Seminole General Council during the period from 1870 to 1874; and (c) the payments of \$62,500.00 made to the United States Indian Agent in 1907, 1908, and 1909. These set-offs were allowed by the court below, and petitioner's claim was thus reduced from \$154,551.28 to \$13,501.10 (R. 23-25, 42):

A. THE OVERPAYMENTS ARE DEDUCTIBLE

The findings show (R. 13) that the direct per capita payments exceeded \$25,000.00 in five different years (1875, 1877, 1880, 1882, and 1883). These overpayments totalling \$12,127.54 should, of course, be deducted. *Wisconsin Central R. R. v. United States*, 164 U. S. 190, 212; *Florida Central and Peninsula R. R. v. United States*, 43 C. Cls. 572, 580-582. Petitioner does not contend otherwise (Br. 19-22), apparently realizing that these overpayments, if not allowed as set-offs under general accounting principles, must be allowed as gratuity offsets under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 596.

B. PAYMENTS MADE PURSUANT TO RESOLUTIONS OF THE TRIBAL COUNCIL ARE ALSO DEDUCTIBLE

The findings show that during the years from 1870 to 1874 interest payments totalling \$66,422.64 from the fund in question were made directly to

the tribal treasurer (\$37,500.00)¹⁷ and to designated creditors (\$28,922.64) pursuant to requests of the Seminole General Council (R. 13, 44-50). Direct per capita payments for those years were in a correspondingly reduced amount (R. 13). Since the Seminole Nation at that time was a semiautonomous political entity which conducted its affairs through a tribal council possessing authority to enter into treaties and other agreements with the United States, and since the payments were made at the request of the tribal council, the tribe is not entitled now to receive these payments a second time. Cf. *Duncan v. Jaudon*, 15 Wall. 165, 171-172; *Magee v. United States*, 282 U. S. 432, 434; *Pope v. Farnsworth*, 146 Mass. 339, 343; *Lannin v. Buckley*, 256 Mass. 78, 82; *Matter of Niles*, 113 N. Y. 547, 559; see Perry, *Trusts and Trustees* (7th ed.) sec. 849; American Law Institute, *Restatement of the Law of Trusts* (1935) sec. 216. While it is true that Article VIII of the 1856 Treaty establishing the \$500,000.00 trust fund provided that these payments should be made per capita for the benefit of each individual Indian,¹⁸ the agreement

¹⁷ The fact that the fiscal officer's accounts were disallowed with respect to these payments does not, of course, bear on the correctness of the finding of the court below that the \$37,500.00 was paid to the tribal treasurer.

¹⁸ It is shown in point V (*infra*, pp. 45-47), that the provision for per capita payments was by mutual agreement of the parties changed in 1879 so as to provide for payments to the treasurer of the Seminole Nation.

was one between the United States and the tribe and not one between the United States and the individual members of the tribe. Since the tribe received the money the Seminole Nation cannot now complain merely because the payments were not made directly to the individual members of the tribe. *The Sac and Fox Indians*, 220 U. S. 481, 484; *Blackfeather v. United States*, 190 U. S. 368, 377.

If, however, the Government is not entitled to a credit of \$66,422.44 for the payments which were made directly to the tribal treasurer and to designated creditors pursuant to these requests of the Seminole General Council, it would seem clear that the amount so paid should be allowed as a gratuity offset under the 1935 act.¹⁹

¹⁹ Petitioner anticipates this defense and argues (Br. 21, n. 1) that no offset should be allowed because the 1935 act provides "That funds appropriated and expended from tribal funds shall not be construed as gratuities." We think this proviso has no application here because the moneys in question were appropriated "out of any money in the [United States] Treasury not otherwise appropriated." See, *e. g.*, Act of April 10, 1869, 16 Stat. 13, 30; Act of July 15, 1870, 16 Stat. 335, 350; Act of March 3, 1871, 16 Stat. 544, 560. The proviso in the 1935 act refers to the frequent and familiar Congressional practice of making appropriations "out of any moneys belonging to [a specified] tribe in the United States Treasury or deposited in any bank or held by any official under the jurisdiction of the Secretary of the Interior * * *." See, *e. g.*, section 19 of the Act of May 18, 1916, c. 125, 39 Stat. 123, 147; section 18 of the Act of May 25, 1918, c. 86, 40 Stat. 561, 580.

C. PAYMENTS DIRECTLY TO THE UNITED STATES INDIAN AGENT
ARE LIKEWISE DEDUCTIBLE

The findings show that during the years from 1907 to 1909 interest payments of \$62,500.00 were made directly to the United States Indian Agent for the use of the Seminole Nation (R. 13). The Government should receive credit for such payments, because Congress in section 11 of the Act of April 26, 1906, 34 Stat. 137, 141, expressly directed—

That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. * * *

Accordingly, after 1906 the interest on the \$500,000.00 trust fund was collected by the United States Indian Agent under the authority of this

act. It was subsequently expended by him for the benefit of the tribe.²⁰

If this Court should hold that the \$62,500.00 paid to the Indian Agent for the Seminole Nation and by him expended for the benefit of the tribe did not discharge the Government's treaty obligation for the two and one-half years in question, it must in any event be allowed as a gratuity offset under the 1935 act.

From the foregoing analysis of the interest payments made under the \$500,000.00 trust fund provided for by the treaty of 1856, it will be seen that as against the claimed deficiency of \$154,551.28 the Government is entitled to credits of \$12,127.54 for overpayments, \$66,422.64 for payments made directly to the tribal treasurer, and \$62,500.00 for payments made directly to the Indian Agent for the Seminole Nation (\$141,050.18 in all). It follows that petitioner's claim for \$154,551.28 was correctly reduced to \$13,501.10, the amount allowed by the court below (R. 23-25, 42).

²⁰ There is no formal finding by the Court of Claims that the United States Indian Agent actually disbursed the \$62,500.00 which was paid to him in 1907, 1908, and 1909. But the report of the General Accounting Office, which was filed as part of the record of this case in the court below, shows that these moneys were in fact expended by the Indian Agent for "per capita payments" and for "administrative expenses (Seminole National Government)" (pp. 308-310). See Appendix, pp. 64-65.

III

PETITIONER'S CLAIM FOR \$61,347.20 FOR NONPAYMENT AND MISPAYMENT OF INTEREST ACCRUING FROM THE \$50,000 TRUST FUND ESTABLISHED UNDER ARTICLE III OF THE TREATY OF 1866 WAS RIGHTLY REDUCED TO \$3,097.20

Item 3 (Fdg. 6, R. 13-14; Opinion, R. 25-26; Br. 22-23) is a claim for \$61,347.20 based on Article III of the Treaty of March 21, 1866, 14 Stat. 755, in which the United States agreed to establish a \$50,000.00 trust fund for the Seminole Nation and pay thereon annual interest of 5 percent (\$2,500.00) to be used for "the support of schools." Petitioner contends (Br. 22-23) (a) that during the period from 1867 to 1874 the Government discharged only partially the annual obligation created by the treaty, the total deficiency amounting to \$3,097.20; (b) that during the period from 1875 to 1898 twenty-three annual instalments of interest (\$57,500.00 in all), instead of being expended directly by the United States for the support of schools, were paid to the tribal treasurer;²¹ and (c) that in 1907 a payment of \$750.00 was similarly made to the United States Indian Agent.

A. UNDERPAYMENTS

The court below found, and the parties agree, that of the \$20,000.00 appropriated from 1867 to

²¹ Alleged mispayments to the tribal treasurer during the years 1898 to 1907 are not included in this item as they constitute a part of item 5. (See n. 16, p. 25, *supra*.)

1874, only \$16,902.80 was disbursed for the support of schools, and that accordingly \$3,097.20 is now due the Seminoles (R. 14, 26).

B. PAYMENTS MADE TO TRIBAL TREASURER

The Seminoles are not entitled to recover the \$57,500.00 which was actually paid to their tribal treasurer from 1875 to 1897 (R. 14). During that period the Seminoles had their own government and conducted their own schools.²² Under these circumstances the tribal treasurer was an entirely appropriate person to receive the interest payment for the support of schools. There was no requirement that the money be expended directly by the United States. And the evidence shows "that the tribal treasurer disbursed annually not less than \$2,500.00 in excess of amounts it was otherwise obligated to expend for the maintenance of schools" (R. 25-26). It follows that the United States is not liable to the Seminoles for the \$57,500.00 which it paid to the tribal treasurer as interest on the trust fund established pursuant to Article III of the 1866 Treaty.

²² See Annual Report of the Department of the Interior for the fiscal year ending June 30, 1899, 56th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 94; Report for the fiscal year ending June 30, 1900, 56 Cong., 2nd sess., H. Doc. No. 5, Indian Affairs, p. 86; Report for the fiscal year ending June 30, 1901, 57th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 135. See also *Chickasaw Nation v. United States*, 87 C. Cls. 91, 93-94.

Again the Government urges that if the \$57,500.00 which was paid to the Seminole tribal treasurer did not to that extent discharge the Government's obligation under Article III of the 1866 Treaty, then the sum thus paid is a gratuity offset which should be allowed under the 1935 act.

C. PAYMENT MADE TO INDIAN AGENT

Nor are the Seminoles entitled to recover the \$750.00 interest payment made from this fund to the United States Indian Agent in 1907, because that payment was fully authorized by section 11 of the 1906 act (*supra*, pages 29-30), and was expended for their benefit. See note 20, *supra*, page 30. But if it be held that the \$750.00 payment did not constitute a discharge *pro tanto* of the Government's obligation under the 1866 Treaty, the sum thus paid must be deemed a gratuity offset to be added to the \$705,337.33 allowed by the court below.

IV

THE GOVERNMENT'S OBLIGATION UNDER ARTICLE VI OF THE TREATY OF 1866 TO ESTABLISH "SUITABLE AGENCY BUILDINGS" FOR THE SEMINOLES HAS BEEN FULLY DISCHARGED

Item 4 (Fdg. 7, R. 14; Opinion, R. 26-27; Br. 23-25) is a claim based on the Government's promise in Article VI of the Treaty of March 21, 1866, 14 Stat. 755, 758, to construct, "at an expense not exceeding Ten Thousand (\$10,000.00).

Dollars, suitable agency buildings" on the Seminole reservation. Petitioner construes this as an agreement to spend *at least* \$10,000.00. It concedes (Br. 24) that in 1870 and 1872 the Government expended \$931.76 for this purpose, and contends that \$9,068.24 is still owing.

However, in addition to the \$931.76, which petitioner admits was expended from general appropriations, the Court of Claims found (R. 14-15) that Congress by the Act of May 18, 1872, 17 Stat. 122, 132, specifically appropriated \$10,000.00 to fulfill its treaty obligation and that \$9,030.15 of this appropriation was expended for some purpose (inasmuch as only \$969.85 was later returned to surplus). The court also found (R. 15) that "an agency building was erected on the Seminole Reservation in the year 1873."²³ The Court of Claims accordingly concluded that there had been no violation of the treaty provision, petitioner having made no claim that the building erected

²³ In this connection the court referred in its opinion (R. 26-27) to the report of the Commissioner of Indian Affairs for 1873, pp. 211-212. Petitioner contends (Br. 24) that this report merely shows that some sort of building "was in the process of *being* constructed," and not that it was actually constructed. The pertinent paragraph of the report is as follows:

"Since the agency building was commenced, the 10th of July, some dissatisfaction has been produced, because all who made application did not obtain employment, and those who did obtain it appear sorry that their labor is *about ended* there, *the building being now nearly finished.*" [Italics supplied.]

was not "suitable" (R. 26-27). Inasmuch as Article VI provided merely for the erection of "suitable agency buildings" at an expense "not exceeding Ten Thousand (\$10,000.00) Dollars" it follows that the expenditure by the Government of \$931.76, referred to earlier, and of the funds required for the construction in 1873 (in all probability the \$9,030.15 from the special appropriation) completely discharged its liability under this provision of the 1866 Treaty.

V

THE UNITED STATES IS NOT LIABLE TO THE SEMINOLE NATION FOR THE \$864,702.58 WHICH WAS PAID TO THE TRIBAL TREASURER AT THE REQUEST OF THE TRIBAL COUNCIL DURING THE PERIOD FROM JULY 1, 1898, TO JUNE 30, 1907

Item 5 (Fdg. 8, R. 15-16; Opinion, R. 27-30; Br. 25-42) is a claim for all moneys paid to its tribal treasurer after the passage of the Curtis Act of June 28, 1898, 30 Stat. 495, 502. The payments involved were made during the fiscal years from 1899 to 1907, and totalled \$864,702.58. Of this amount, \$212,500.00 was paid to fulfill the obligation of the United States under Article VIII of the Treaty of 1856 with the Seminole Nation, providing for per capita payments of \$25,000.00 per annum; \$29,750.00 was to fulfill the obligation under Article III of the Treaty of 1866, providing for the payment of interest at 5 percent on \$50,000.00, for school purposes, and 5 percent

interest on \$20,000.00, for the support of the Seminole government; \$622,156.87 was to carry out the provisions of section 12 of the Act of March 2, 1889, 25 Stat. 980, 1004, for the payment of interest at 5 percent per annum on \$1,500,000.00, "to be paid semi-annually to the treasurer of said nation." The remainder, \$295.71, is "proceeds of labor" (R. 15). It is petitioner's contention that section 19 of the Curtis Act forbade the making of these payments directly to the tribe or its officers.

To this claim the Government makes the following answer: (a) the payments were properly made to the tribal treasurer; (b) even if the payments to the tribal treasurer were in violation of section 19, the tribe has no standing to complain; and (c) payments made to the tribal treasurer and by him expended for the benefit of the tribe, if not a discharge of the Government's legal obligations, are in any event gratuity offsets allowable under the 1935 act.

A. THE \$864,762.58 WAS PROPERLY PAID TO THE TRIBAL
TREASURER

1. *Section 19 of the Curtis Act prohibits only payments to tribal officers which are "for disbursement", i. e., payments to be distributed by them to members of the tribe.*—That section 19 was not intended to cover all payments to the Five Civilized Tribes is shown by the language of the act, by its legislative history, and by statutes *in pari materia*.

a. *Language*.—Section 19 of the Curtis Act of June 28, 1898, 30 Stat. 495, 502, contains the following prohibition:

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

The words of the opening clause restrict its operation to those payments which are made to a tribal government or officer as an agent "for disbursement". The phrase "on any account whatever" which appears in the clause does not relax this restriction on the application of section 19 but merely recognizes that every payment "for disbursement" is included, regardless of the contract which gave rise to the obligation or the account to which the payment is charged. The restriction of the first clause is reflected in the express provisions of the second. It is there recognized that the first clause has barred the customary method of making "payments of all sums to members of said tribes", and that a way out of the impasse must be furnished. Accordingly, the second clause

directs that "payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him". The remaining clauses of the section deal with a problem arising out of a particular category of payments for disbursement to members of tribes, namely, "per capita payments". And it is provided that these payments "shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

If section 19 were to be construed as prohibiting all payments to the tribe or its officers, then the later clauses of the section would be inadequate to dispose of the problems raised by the first clause: the first clause would withhold all moneys of every kind from the tribal government or its officers, while the succeeding clauses would make provision only for payments to members or per capita payments. The section makes no provision for the payment of the expenses of maintaining and conducting the tribal government.

Therefore, section 19 should be deemed a prohibition against payments of money to the tribal treasurer only where such payments are to be distributed by him to members of the tribe. In those situations the payments are to be made directly to members of the tribe by an appointee of the Secretary of the Interior; but money earmarked for educational or tribal purposes and money intended for any purposes the tribe might

designate could still be paid to the tribal treasurer notwithstanding the prohibition contained in section 19 of the Curtis Act.

b. *Legislative History.*—Section 19, in the bill as originally introduced in the House (H. R. 8581, 55th Cong., 31 Cong. Rec. 3869), was worded as follows:

* * * that no payment of any moneys, on any account whatever, be made to any of the tribal governments or to any officer thereof for disbursement, but payments of *all expenses incurred in transacting their business and of all sums* to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation. [*Italics supplied.*]

Thus the bill as originally drafted prohibited not only the payment of any moneys to tribal officers for disbursement to members but also the payment of moneys to cover the expenses of the tribal governments. The prohibition against payments of moneys to cover expenses incurred in transacting the business of the tribal governments was stricken before the bill was enacted. The striking of this clause would seem a plain expression by Congress of its intention that the tribal officers should retain the right to disburse

their funds for the expenses of their respective tribal governments.

c. *Statutes in Pari Materia.*—Contemporaneously with the adoption of section 19 and as a part of the same act (sections 29 and 30), agreements with the Choctaws and Chickasaws and with the Muscogeas or Creeks were ratified containing the following stipulations, respectively:

That all per capita payments hereafter made to the members of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary [30 Stat. 512].

* * * All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to the Secretary [30 Stat. 518].

These two provisions are *in pari materia* with section 19. Like section 19, they deal only with payments to members of the tribes.²²

²² See also the Indian Appropriation Act of June 10, 1896 (fiscal year 1897), 29 Stat. 321, 336, which contained the following provision: "That any sums of money hereafter to be paid per capita to individual Indians shall be paid to said Indians by an officer of the Government designated by the

It is also significant that the following provision of the Act of June 7, 1897, 30 Stat. 62, 84,

That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage: * * *

was entirely repealed as to the Seminoles by the terms of the agreement with that tribe ratified July 1, 1898 (30 Stat. 567, 569), and was repealed as to tribal laws appropriating money for the regular and necessary expenses of the tribal government by the agreements with the Choctaws and Chickasaws (30 Stat. 495, 513), and with the Muscogees or Creeks (30 Stat. 495, 518) ratified by the Act of June 28, 1898. These repeals manifested the intent of Congress to restore to these tribes the full control which they theretofore exercised over the expenses of maintaining and conducting the tribal governments.

In view of the foregoing, it is submitted that in holding (R. 29-30) that section 19 related only to funds which were to be distributed to members of

Secretary of the Interior." [Italics supplied.] An attempt to insert an almost identical provision in the Indian Appropriation Bill for the fiscal year 1898 was defeated on a point of order. 29 Cong. Rec. 1261.

the tribe, the Court of Claims rightly followed its prior decision in *Choctaw Nation v. United States*, 91 C. Cls. 320, 391-393, certiorari denied, 312 U. S. 695.

2. *The payments in question were not "for disbursement" to members of the tribe and therefore were not covered by the prohibition in section 19.*—As stated above, the record shows that the \$864,702.58 paid to the tribal treasurer during the fiscal years 1899 to 1907 was made up of the following items: (a) \$29,750.00 was interest on the trust funds established for "the support of schools" and "for the support of the Seminole government" under Article III of the Treaty of 1866; (b) \$622,156.87 was interest on the general fund of \$1,500,000.00 set up under the Act of March 2, 1889, 25 Stat. 980, 1004; (c) \$295.71 was "Indian moneys, proceeds of labor";²⁵ and (d) \$212,500.00 was interest on the \$500,000.00 trust fund set up under Article VIII of the Treaty of 1856. It is the Government's contention that none

²⁵ The Act of March 2, 1887, 24 Stat. 449, 463, provides:

"That the Secretary of the Interior is hereby authorized to use the money which has been or may hereafter be covered into the Treasury under the provisions of the act approved March third, eighteen hundred and eighty-three, and which is carried on the books of that Department under the caption of 'Indian moneys, proceeds of labor,' for the benefit of the several tribes on whose account said money was covered in, in such way and for such purposes as in his discretion he may think best, and shall make annually a detailed report thereof to Congress."

of these funds were for disbursement to individual members of the tribe, and that in consequence section 19 of the Curtis Act was inapplicable.

a. The item in relation to which section 19 is most plainly not relevant is the interest on the \$70,000.00 trust established by Article III of the Treaty of March 21, 1866; the article provided that:

* * * fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * *

This treaty states, without the slightest ambiguity, that the purposes of this trust were to give \$2,500.00 annually for "the support of schools" and \$1,000.00 annually "for the support of the Seminole government." The money was not intended for individual Indians.

b. The interest payments from the trust of \$1,500,000.00 established by section 12 of the Act of March 2, 1889, 25 Stat. 980, 1004, are also outside the scope of section 19. The terms of the trust are as follows:

One million five hundred thousand dollars to remain in the Treasury of the United

States to the credit of said nation of Indians [the Seminoles] and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eightynine, said interest to be paid semi-annually to the treasurer of said nation, * * *

There are no restrictions respecting the uses to which the money thus paid to the tribal treasurer should be put, and as a result the money could be used for any purpose which the tribal council might designate.

c. Likewise, the payment to the tribal treasurer of the \$295.71 listed as "Indian moneys, proceeds of labor" did not contravene section 19, in view of the provision of the Act of March 2, 1887, 24 Stat. 449, 463, set out earlier in this brief in note 25, page 42.

d. While the Court of Claims held that none of the foregoing payments was covered by section 19, it rejected without discussion (R. 30) the Government's contention that the interest (\$212,500.00)* from the trust fund established by Article VIII of the Treaty of 1856 was not for per capita distribution.²⁸

²⁸ The Court of Claims based its refusal to allow recovery by the tribe of the \$212,500.00 on the ground that petitioner had no standing to complain of the violation of the Curtis Act. The Government believes that this holding was sound and in point B, pp. 57-64, *infra*, advances the argument as a defense not only to the claim for \$212,500.00 but to the entire claim of \$864,702.58 involved in Item 5.

The Government concedes that that trust originally provided that the interest should be paid per capita for distribution to members of the Seminole Tribe. In Article VIII the Government promised the Seminoles:

* * * to invest for them the sum of two hundred and fifty thousand dollars, at five percent per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the United tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *

However, almost twenty years before the Curtis Act the character and purposes of this interest payment were by agreement changed into a payment for the benefit of the Seminole Nation itself, like the interest on the \$1,500,000.00 statutory trust.

In the Act of April 15, 1874, 18 Stat. 29, Congress provided:

That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now

due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided*, That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further*, That the consent of said tribe to such expenditures and payment shall be first obtained.

This statute was not a unilateral mandate which attempted to change the annuities from per capita disbursements to payments to the Nation's tribal treasurer; it merely authorized the Commissioner of Indian Affairs, with the consent of the Secretary of the Interior and the President, to make an offer "to pay such annuities or any part thereof into the treasury of the Seminole nation". The new method of payment authorized was to become effective only if "the consent of

said tribe to such expenditures and payment shall be first obtained."

Such an offer was made and accepted in the manner provided by the Act of April 15, 1874. By the act of the Seminole legislature (also called council), on April 2, 1879, the tribe consented that all annuities then due or thereafter to become due from the United States under the provision of the eighth article of the Treaty of August 7, 1856, should be paid into the treasury of the Seminole Nation, to be used as the tribal council should provide. See opinion of Assistant Comptroller Mitchell, dated August 23, 1898, Appendix, pp. 39-54. Thus there was a consensual conversion of the Government's obligation on the trust from payments of interest for the benefit of individual Indians to payments for the benefit of the tribe. To that extent the Treaty of 1856 was modified, so that when the Curtis Act was enacted it did not affect this trust.

3. *If section 19, properly construed, applied to all payments to the tribal governments, then it was inconsistent with and has been superseded by subsequent special agreements with each of the Five Tribes.*—In 1893 the Dawes Commission undertook to negotiate agreements with the Five Civilized Tribes, looking toward the termination of the tribal governments and the distribution in severalty of tribal property. Section 16 of the Act of March 3, 1893, 27 Stat. 612, 645. However, after three years of attempts to reach agreements

with the Indians, Congress despaired of achieving voluntary action. Cohen, *Handbook of Federal Indian Law* (1941) 431. The determination of Congress to proceed without the consent of the tribes found expression in the Act of June, 1897, 30 Stat. 62, 84, and in the first 28 sections of the Curtis Act of June 28, 1898, 30 Stat. 495. The legislative history of the latter act makes it clear that Congress contemplated that many of the provisions in the first 28 sections would be superseded if and when the tribes ratified agreements negotiated by the Dawes Commission. 31 Cong. Rec. 5588.²⁷ Two such proposed agreements, one with

²⁷ For example, Senator Jones, of the Committee on Indian Affairs, who had charge of the bill on the floor of the Senate (31 Cong. Rec. 1493-1494), made the following explanation as to the relationship between the agreement set out in section 29 and the 28 sections which preceded it (31 Cong. Rec. 5588): "Mr. President, the bill, beginning with section 28 [now 29], provides for the submission of the agreement which has heretofore been made between the Dawes Commission and the Indian tribes and for a settlement of all of these difficulties. The bill before us, on page 28, looks to a disposition of all of these questions by the Government of the United States. The Indians have not ratified this agreement. Their agents made the agreement with the Dawes Commission, and this provision of section 28 [29] is that in case they do ratify the agreement, then the terms of the agreement shall supersede the others and shall be enforced; but, if it is not ratified, then the provisions of the bill before section 28 [29] shall become the law and be operative in that Territory. That reconciles the apparent discrepancy pointed out by the Senator from Alabama."

the Choctaws and Chickasaws (section 29) and one with the Creeks (section 30), were appended to the Curtis Act and were to be effective when approved at a tribal election.

A similar agreement, already ratified by the Seminoles, was approved by Congress on the same day the Curtis Act was passed, and was signed by the President on July 1, 1898 (30 Stat. 567). The act ratifying the Seminole agreement provided for the repeal of "all laws and parts of laws inconsistent therewith" (30 Stat. 567, 569). It is clear from this provision and from the history of the Curtis Act that Congress intended the special agreement with the Seminoles to supersede the inconsistent provisions in the first 28 sections of the Curtis Act.

If section 19 be construed as prohibiting all payments to the tribal officers, including the payment of the expenses of maintaining and conducting the tribal governments (as distinguished from payments for disbursement to members of the tribe), then the section is plainly inconsistent with the Seminole agreement. That agreement, the provisions of which are set forth in the Appendix at pp. 21-27, shows that the intent and purpose of Congress and the Seminole Nation was to continue the existence of the tribal government with all of its machinery until the affairs of the tribe were

concluded and the tribe was ready to go out of existence.²⁸

In passing it should be noted that following the Seminole agreement and prior to the end of 1902, similar agreements were entered into with the other four tribes.²⁹ Like the Seminole agreement these agreements are inconsistent with and supersede section 19 of the Curtis Act if section 19 be construed as forbidding all payments to tribal officers. 30 Stat. 505, 512 (quoted page 40, *supra*); 30 Stat. 514, 518 (quoted page 40, *supra*); 31 Stat. 870, 872; 32 Stat. 725, 727.

4. *The inapplicability of section 19 to the payments in question is supported by the administrative construction, which in turn has been implicitly approved by Congress.*—After enactment of the

²⁸ Section 8 of the Act of March 3, 1903, 32 Stat. 982, 1008 provided that the tribal government of the Seminole Nation should not continue longer than March 4, 1906. However, the Resolution of March 2, 1906, 34 Stat. 822, continued the governments of the Five Civilized Tribes "until all property of such tribes * * * shall be distributed among the individual members". The next month a comprehensive law was passed which indefinitely continued the existence of tribal governments but made their actions subject to the approval of the President. Act of April 26, 1906, 34 Stat. 137-148.

²⁹ The Atoka agreement, which is set forth in section 29 of the Curtis Act, was subsequently ratified by the Choctaws and Chickasaws; the agreement with the Creeks in section 30 of the Curtis Act was rejected by them and a new agreement was ratified by the Act of March 1, 1901, 31 Stat. 861, 32 Stat. 1971; an agreement with the Cherokees was ratified by the Act of July 1, 1902, 32 Stat. 716.

Curtis Act and approval of the Seminole agreement on July 1, 1898, the Secretary of the Interior sought an opinion from the Assistant Attorney General for the Department of the Interior concerning the effect of section 19 of the Curtis Act. Assistant Attorney General Van Devanter gave an opinion dated July 12, 1898,³⁰ which advised that (1) section 19 of the Curtis Act was applicable to the Seminoles, although they were not specifically mentioned; (2) there was no inconsistency between that section and the provision of the Seminole agreement which required that *after the extinguishment of the tribal government* payments to Seminoles should be made by a person appointed by the Secretary of the Interior,³¹ and (3) in any event the method of disbursement contemplated by that provision of the Seminole

³⁰ The opinion is referred to and quoted in part in 82 C. Cls. 135, 157-158.

³¹ The provision in question is as follows (30 Stat. 567, 568):

"All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient *after allotment and extinguishment of tribal government*, * * *. Such payment shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements." [Italics supplied.]

agreement was the same as the method prescribed by section 19.

When Mr. Van Devanter learned that the real question which the Secretary of the Interior had intended to propound related to the meaning of section 19, and more particularly the applicability of its first clause to the making of interest payments from the trust funds here involved, he withdrew his opinion, stating:

The matter involved in this reference and in your original request for an opinion, is of very difficult solution and requires a careful examination of the Seminole treaties and of the legislation by Congress relating to that tribe. The real question intended to be presented is not simply whether section 19 of the act of June 28, 1898, applies to the Seminole tribe, but also whether that section is limited in its application to payments to members or per capita payments, or whether it includes and is applicable to the payment of the expenses of maintaining and conducting the tribal government.

* * * * *

The Comptroller of the Treasury seems to be the final arbiter of questions of the character here involved. An opinion by me upon the question presented would not be conclusive, and since the statute provides the means of obtaining an authoritative decision from the Comptroller of the Treasury, I respectfully suggest that my opinion of the 12th ultimo be withdrawn and that

the matter be presented to the Comptroller of the Treasury for his decision.

I have personally prepared, and herewith submit for your consideration, a form of letter to the Comptroller which, it is believed, presents the real question involved and all matters necessary to its proper solution.³²

The letter which he prepared summarizes the Government's entire argument with respect to the applicability of section 19 to the payments in question: Mr. Van Devanter first points out that the question presented is whether moneys appropriated to pay interest on the trust funds created by Article VIII of the Treaty of 1856, Article III of the Treaty of 1866, and the Act of March 2, 1889, may be disbursed to the treasurer of the Seminole Nation. He then states that the Department of the Interior desires to disburse the money in that manner unless section 19 of the Curtis Act prohibits such payments. In support of the Department's position he argued (1) that section 19 applied only to payments for disbursement to members of the tribe; (2) that none of the payments in question came within that prohibition, and (3) that, if section 19 applied to *all* payments,

³² The quotation in the text is taken from a letter which Assistant Attorney General Van Devanter wrote to the Secretary of the Interior on August 15, 1898. This letter was introduced in evidence in the Court of Claims. The full text is printed in the Appendix at pages 37-39.

it was inconsistent with and superseded by the Seminole agreement approved July 1, 1898.³³

After receiving this letter, Assistant Comptroller of the Treasury Mitchell ruled:

From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal government of its privilege and duty of disbursing its own funds prior to the time of the extinguishment of its tribal government, which extinguishment is evidently contemplated in the near future; therefore, I am of opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished.³⁴

This contemporaneous ruling as to disbursements under these trust funds is entitled to great weight since it was given by an official whose decision was authorized to "govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement." Sec-

³³ This letter of Mr. Van Devanter, dated August 16, 1898, is set out in full in Assistant Comptroller Mitchell's opinion of August 23, 1898, Appendix, pp. 39-53.

³⁴ Opinion dated August 23, 1898; the full text is printed in the Appendix, pp. 39, 53-54. Cf. opinion dated August 30, 1898, 5 Comp. Dec. 93, ruling with respect to payments to the Creek Indians that section 19 of the Curtis Act would be superseded if the Creeks ratified the proposed agreement set forth in section 30 of that Act. 30 Stat. 495, 514-519.

tion 8 of the Act of July 31, 1894, 28 Stat. 162, 208.

The administrative construction was specifically drawn to the attention of Congress. In the Annual Report of the Department of the Interior for the fiscal year ending June 30, 1899, 56th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 197, the Secretary of the Interior transmitted to Congress the report of United States Indian Agent J. Blair Shoenfelt pointing out that—

By reason of this treaty [the Seminole Agreement of 1897], which was afterwards ratified by Congress, the Seminoles are not under the provisions of the Curtis Act, and the Indian agent does not receive or disburse any of their moneys, it being done by the tribal officers * * *

Two years later, a like report of the same agent, transmitted to Congress as part of the Annual Report of the Department of the Interior for the fiscal year ending June 30, 1901, 57th Cong., 1st sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 231, noted that—

By reason of this agreement, which was afterwards ratified by Congress, the Seminoles are not under the provisions of the act of Congress of June 28, 1898, and the Indian agent does not receive or disburse any of their moneys, it being done by tribal officers.

Again, the next year, the report of the same agent indicated that "no revenues or royalties of any character have been collected by me for the benefit of the Seminole Nation during the fiscal year ended June 30, 1902." Annual Report of the Department of the Interior for the fiscal year ending June 30, 1902, 57th Cong., 2nd sess., H. Doc. No. 5, Indian Affairs, pt. I, p. 206.

In the face of these reports Congress continued to make appropriations for the payment of interest on the Seminole trusts. Act of July 1, 1898, 30 Stat. 571, 580; Act of March 1, 1899, 30 Stat. 924, 933; Act of May 31, 1900, 31 Stat. 221, 230; Act of March 3, 1901, 31 Stat. 1058, 1067-1068; Act of May 27 1902, 32 Stat. 245, 253; Act of March 3, 1903, 32 Stat. 982, 989; Act of April 21, 1904, 33 Stat. 189, 198-199; Act of March 3, 1905, 33 Stat. 1048, 1054. Thus an administrative construction of the Curtis Act, made in 1898, shortly after enactment of the statute in question and approval of the Seminole agreement, was implicitly ratified by Congress in subsequent years, and has stood unchallenged until this law suit. We submit that the present case falls plainly within the doctrine stated by this Court in *Alaska Steamship Company v. United States*, 290 U. S. 256, 262.

Courts are slow to disturb the settled administrative construction of a statute long and consistently adhered to * * *. That construction must be accepted and applied

by the courts when, as in the present case, it has received Congressional approval, implicit in the annual appropriations over a period of thirty-five years, * * *.

See also *Brooks v. Dewar*, 213 U. S. 354, 360.

In view of the foregoing, we submit that the payment of \$864,702.58 to the tribal treasurer during the fiscal years 1899 to 1907³⁵ was not prohibited by section 19 of the Curtis Act.

B. IF THE PAYMENT OF THE \$864,702.58 TO THE TRIBAL TREASURER WAS IN VIOLATION OF SECTION 19 OF THE CURTIS ACT, THE PETITIONER HAS NO STANDING TO COMPLAIN

Assuming, *arguendo*, that section 19 of the Curtis Act was violated by making the payments in question to the tribal treasurer, we think it clear that petitioner cannot complain, for the following reasons: (1) section 19 gave no right of action to the Seminole Nation; (2) the tribe may not complain of payments made at its request; and (3) there is no showing that the payments to the tribal treasurer resulted in injury to petitioner or even to individual Indians.

1. Section 19 was not a contractual agreement with the tribe or its members. It was merely a direction to the fiscal officers of the United States, which Congress could change at will. *The Sac*

³⁵ As a result of the Act of April 26, 1906, 34 Stat. 137, 141, and the construction placed upon it by Attorney General Bonaparte in his opinion of August 19, 1907 (see Appendix, pp. 58-61), payments to the tribal treasurer stopped in 1907. Cf. Opinion of Comptroller Tracewell, dated October 19, 1906, Appendix, pp. 55-58.

and *Fox Indians*, 220 U. S. 481, 483-484, 489-490. In continuing to make payments to the tribal treasurer after 1898, the officers of the Government violated no agreement with the Seminoles; they merely continued to make payments to the very officer who had been receiving them prior to 1898. Any violation of section 19 was, as the court below held (R. 30), a matter between Congress and the administrative officers of the Government, and not one between the United States and the Seminoles.

Since petitioner seeks (Br. 40-41) to distinguish the *Sac and Fox* case, *supra*, it is appropriate to examine it in some detail. There the Government had promised, by the Treaty of October 11, 1842, 7 Stat. 596, "to pay annually to the Sacs and Foxes, an interest of five per centum upon the sum of eight hundred thousand dollars." The larger part of this tribe was together in the West, first in Kansas and later in Oklahoma. A band, however, settled in Iowa. Nonetheless, at the outset the Government paid the entire annuity to those who were on the reservation in the West. With this or other similar situations in mind, Congress provided in section 3 of the Indian Appropriation Act of August 30, 1852, 10 Stat. 41, 56,—

That no part of the appropriations herein made, or that may hereafter be made, for the benefit of any Indian, or tribe, or part of a tribe of Indians, shall be paid to any attorney or agent of such Indian, or tribe,

or part of a tribe; but shall in every case, be paid directly to the Indian or Indians themselves to whom it shall be due, or to the tribe or part of a tribe, *per capita*, unless the imperious interest of the Indian or Indians, or some treaty stipulation, shall require the payment to be made otherwise, under the direction of the President. * * *

Even after the enactment of this statute, which directed that the officers of the United States make payment due to members of an Indian tribe "directly to the Indian or Indians themselves to whom it shall be due", the Government continued to make payment solely to those who were on the reservation. The Iowa band contended that this was a violation of the 1852 Act, of which they could complain, and accordingly filed their first claim on that basis. This Court denied the claim. Among other reasons for this result, Mr. Justice Holmes stated (220 U. S. 483-484):

The act of 1852 gave no vested rights to individuals. It was not a grant to the Indians but a direction to agents of the United States, subject to other directions from the President. See *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 387. The Government did not deal with individuals but with tribes. *Blackfeather v. United States*, 190 U. S. 368, 377. See *Fleming v. McCurtain*, 215 U. S. 56. The promises in the treaties under which the annuities were due were promises to the tribes.

It is plain that this quotation gives two reasons. One is that where money has been promised to Indians and the promise has been performed in accordance with the agreement but in conflict with a statute giving "a direction to agents of the United States" how to make the disbursement, the Indians have no right to complain. This reason, which is the one upon which we rely here, is buttressed by a relevant citation, *Wisconsin & Michigan Ry. Co. v. Powers*, 191 U. S. 379, 387. The second reason given in the quotation is that even if the conduct were a wrong to the Indians, the wrong was one of which only the tribe as a whole, and not a fraction of it, could complain. For this principle the citation given by Mr. Justice Holmes is *Blackfeather v. United States*, 190 U. S. 368, 377.

In the *Sac and Fox* case, the second claim advanced by the Iowa tribe was based on the Indian Appropriation Act of March 2, 1867, 14 Stat. 492, 507. This act, after making the appropriation of the annuity due the Sac and Fox Indians, contained the proviso—

That the band of Sacs and Foxes of the Mississippi now in Tamar county, Iowa, shall be paid pro rata, according to their numbers, of the annuities, so long as they are peaceful and have the assent of the government of Iowa to reside in that State.

The Iowa band alleged that the Government failed to distribute in accordance with this proviso. In

denying this claim this Court remarked (220 U. S. 485):

This is subject to the same comment as the act of 1852 when relied upon as a foundation for individual rights under it.

The third claim presented by the Iowa band was founded on the Indian Appropriation Act of July 4, 1884, 23 Stat. 76, 85, where, after an appropriation for interest payable under the Treaty of 1842, it was provided that thereafter the Iowa Sacs and Foxes should have apportioned to them from treaty appropriations—

* * * their per capita proportion of the amount appropriated in this act, subject to provisions of treaties with said tribes; but this shall apply only to the Sacs and Foxes now in Iowa: *And provided further*, That this shall apply only to original Sacs and Foxes now in Iowa to be ascertained by the Secretary of the Interior.

The Iowa band alleged that the apportionment had been improper and they had not received a fair share of the per capita payments. In rejecting this claim the Court made the following comment (220 U. S. 486), which amplifies the rule already stated:

But here for a third time we are dealing with a statute, not with a treaty. There is no intimation of an intent to change the terms of the treaties by which the contracts were made not with individuals but with the tribes. The statute neither changed nor

conferred rights. It simply directed the Secretary of the Interior how the contracts of the United States should be performed.

Summarizing the Court's decision rejecting all three claims, Mr. Justice Holmes said (220 U. S. 489-490):

The treaty contracts on which the plaintiff's claims are founded gave rights only to the tribe, not to the members. It was an accepted and reasonable rule, especially in the days when Indians' wars still were possible and troublesome, that payments to the tribe should be made only at their reservation and to persons present there. The acts of 1852 and 1867 did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones. The payments up to 1884 had the sanction of statute. The act of 1884 no more created individual rights than did the acts of 1852 and 1867.

Here again the quoted passage announces two propositions, of which the first is directly pertinent to our contention: Where money has been promised to a tribe of Indians, and the promise has been performed, in accordance with the agreement but in conflict with a statute giving instructions, with respect to disbursements, to officers of the United States, the legal rights of the Indians have not been infringed.

This proposition and this quotation apply directly to the case at bar. The treaties here "gave

rights only to the tribe, not to the members." These treaties, as mutually modified, were followed. The Curtis Act "did not shift the treaty rights from the tribe to the members, create new rights or enlarge old ones."

2. Moreover, the record shows that the payments now complained of were made to the tribal treasurer at the request of the Seminole General Council (R. 15). At that time, and until the Act of April 26, 1906, 34 Stat. 137, took effect, the Seminole Nation conducted its affairs and its relations with the United States through its tribal council, the general governing body of the tribe. Therefore, when the officers of the tribe made a demand that moneys be paid into its tribal treasury, notwithstanding the Curtis Act, that demand was accepted and acted upon as a demand of the tribe. Since the payments were made to the tribal treasurer pursuant to the request of the duly constituted governing body of the tribe, petitioner is not entitled to receive the interest payments a second time. Cf. *Duncan v. Jaudon*, 15 Wall. 165, 171-172; *Magee v. United States*, 282 U. S. 432, 434; *Pope v. Farnsworth*, 146 Mass. 339, 343; *Lanin v. Buckley*, 256 Mass. 78, 82; *Matter of Niles*, 113 N. Y. 547, 559; see Perry, *Trusts and Trustees* (7th ed.), sec. 849; American Law Institute, *Restatement of the Law of Trusts* (1935) sec. 216.

3. In any event the record fails to show that the payments to the tribal treasurer resulted in

damage to petitioner or even to individual Indians. In order to be entitled to recover the \$864,702.58, which it claims, petitioner would not only have to show that section 19 was violated but also that such violation resulted in actual damage in that amount. Petitioner has not sustained this burden. What evidence there is indicates that the money was properly expended by the tribal officers. The court found that the books of the tribal treasurer, though crude, tend to show that \$815,059.71 of these moneys were expended in the years 1899 to 1906 (as distinguished from the fiscal years 1899 to 1907) for schools, per capita payments, salaries of officers, the blacksmith, the physician, etc. (R. 15-16.)

C. PAYMENTS MADE TO THE TRIBAL TREASURER AND BY HIM EXPENDED FOR THE BENEFIT OF THE TRIBE ARE IN ANY EVENT GRATUITY OFFSETS ALLOWABLE UNDER THE 1935 ACT

If it be held that the payments made to the tribal treasurer did not discharge the Government's legal obligations to the tribe, it seems clear that these payments, since they were made at the tribe's request and for its benefit, are gratuity offsets under the 1935 act. In other words, if the payments to the tribal treasurer did not discharge the Government's legal obligations, then the tribe received \$864,702.58 which it ought not to have received at all, and which should therefore be added to the Government's gratuity offsets.

VI

IF THE CONTENTIONS MADE IN THE FOREGOING POINTS ARE CORRECT, THE ALLEGED ERRORS IN THE ALLOWANCE OF GRATUITY OFFSETS NEED NOT BE CONSIDERED

The Court of Claims found (R. 16-20) that the United States has gratuitously spent more than \$700,000.00 for the benefit of the Seminole Nation. And it held (R. 42) that under section 2 of Title I of the Act of August 12, 1935, 49 Stat. 571, 596, the Government was entitled to offset these gratuitous expenditures against the amount found to be due the Indians. Petitioner argues (Br. 42-86) that the court committed numerous errors with respect to the 114 items which it included in the list of offsets. The Government suggests that this Court may find it unnecessary to review these findings and to examine the details of each expenditure.

In the preceding sections of this brief we have urged that the court below correctly determined (R. 42) the Government's total liability to be only \$18,388.30.³⁶ If the Court agrees, then it need not go further because petitioner admits that the Government has offsets totalling at least \$35,539.91.³⁷

³⁶ This total is made up of the following: \$13,501.10 from item 2, p. 26, *supra*; \$3,097.20 from item 3, p. 32, *supra*; and \$1,790.00 which was allowed on petitioner's claim of \$20,000.00 based on Article IX of the Treaty of 1856 (R. 3, 12, 23, 39-41).

³⁷ This total is made up of the following items which, in the court below, petitioner conceded to be proper offsets: \$31,083.79 spent for subsistence of Seminoles (Fdg. 9; R. 16,

Accordingly, the judgment dismissing the petition could be affirmed without further consideration.

It should be noted that when the United States requested findings as to gratuity expenditures its liability had not been fixed and petitioner was asserting claims in excess of \$1,000,000.00 (R. 2-7). In consequence, the Government pleaded all available offsets. But after the court below decided that petitioner was entitled to recover only \$18,388.30, it could simply have employed undisputed offsets in a like amount to cancel out the Government's liability; it was not required to find the full extent of the Government's offsets. See *Assiniboine Indian Tribe v. United States*, 77 C. Cls. 347, 361-362, 377-378 (1933); *Chippewa Indians of Minnesota v. United States*, 87 C. Cls. 1, 38-39 (1938); *Wichita Indians v. United States*, 89 C. Cls. 378, 423 (1939). Cf. *Duwamish, et al. Indians v. United States*, 79

30); \$2,500.00 spent for clothing (Fdg. 11; R. 17, 33); \$425.68, medical attention (Fdg. 12; R. 17, 35); \$5.42, clothing; \$149.90, expenses of delegates; \$35.00, livestock; \$1,124.12, medical attention; \$216.00, provisions (Fdg. 13; R. 18, 37).

In addition, petitioner apparently does not challenge the decision below insofar as it holds the following items totaling \$10,713.79 are proper offsets; \$610.00, clothing (Fdg. 11; R. 17, 32); \$168.80, presents (Fdg. 11; R. 17, 33); \$4,357.57, provisions (Fdg. 11; R. 17, 33); \$171.89, education (Fdg. 12; R. 17, 34); \$4,309.00, expenses of delegates (Fdg. 12; R. 17, 34); \$345.00, feed of livestock (Fdg. 12; R. 11, 34); \$659.12, provisions (Fdg. 12; R. 17, 35); and \$92.41, which is 3.72% of the items "Agricultural implements and equipment", "Feed and care of livestock", "Livestock", "Medical attention", and "Pay and expenses of farmers", in Finding 17, R. 19.

C. Cls. 530, 611-612 (1934); *Choctaw Nation v. United States*, 91 C. Cls. 320, 405 (1940). By the same token this Court, if it affirms as to the amount of liability, need not examine the correctness of the findings with respect to the disputed offsets.

Even if this Court should reverse the decision below it would have no occasion to consider the disputed offset items at this time: In the event of a decision in favor of petitioner with respect to one or more of its claims (accompanied by a determination that the corresponding amounts expended by the United States in attempted satisfaction of its obligations are not proper gratuity offsets), the case should be remanded in order that the Court of Claims could (1) fix the amount of the Government's liability,³⁸ and (2)

³⁸ It is not believed that a decision against the Government on any of the five items would give rise to a liquidated liability: If the decision below were reversed as to item 1 the Court of Claims would still have to determine the damage to the Seminoles resulting from the Government's failure fully to discharge its promise to provide funds for the support of schools, agricultural assistance, and blacksmiths. If its decision were reversed as to item 2, 3, or 5, the Court of Claims would still have to determine the damage to petitioner resulting from the payment of annuities to the tribal treasurer or United States Indian Agent. Similarly, a reversal as to item 4 would leave for future determination the damage suffered by the Seminoles as the result of being forced to transact business with a government agent who occupied a building costing only \$931.76 rather than \$10,000.00.

In the absence of a specific statutory provision, the United States is not liable for interest on money claims. *Smyth v.*

find and designate the precise gratuitous expenditures to be offset against that liability. Unless this second step is taken confusion and uncertainty are likely to arise in subsequent suits by the Seminole Nation.³⁹ Gratuity offsets resemble a fund in bank which may be drawn upon by the Government in successive Indian claims cases until exhausted; it could not be contended that the present judgment of \$18,388.30 wipes out all gratuity offsets which the United States may have against the Seminole Nation. Since offsets may be needed in future cases it becomes important to know precisely which items have been employed to extinguish the liability in the instant case. The alternative to designating the particular offset items which have been used would be to treat as binding in subsequent suits between the present parties the findings of the Court of Claims that the Government has made gratuitous expenditures for the Seminoles in excess of \$700,000.00. The disadvantage of that treatment is made evident when it is considered that as a result this Court would be called upon to examine offsets which might never be needed and which, even if disapproved, would not change the result reached by the Court of Claims.

United States, 302 U. S. 329, 353. The basic jurisdictional act in the present case makes no provision for the payment of interest to the Seminole Nation. Act of May 20, 1924, c. 162, 43 Stat. 133-134.

³⁹See the Seminole Nation's petition for certiorari in No. 830, this Term, pp. 13, 14, 20.

However, to provide for the eventuality that the Court should deem it material now to consider whether the Government has offsets in addition to those conceded by petitioner, the following section of this brief is presented to deal with the findings in question.

VII

GRATUITY OFFSETS

Title I of the second deficiency appropriation Act of August 12, 1935, 49 Stat. 571, 596, 25 U. S. C. sec. 475a, contains the following provision with reference to gratuity offsets:

SEC. 2. In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; * * * *Provided*, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; * * * *Provided further*, That funds appropriated and expended from tribal funds shall not be construed as gratuities; * * *

It is necessary in construing this section of the 1935 act, to consider its legislative background.

Beginning in 1901, Congress adopted the practice of including in special jurisdictional acts for the hearing of Indian claims a provision directing the Court of Claims to offset amounts gratuitously expended by the United States for the Indians.⁴⁰ However, a few acts were passed without such a provision.⁴¹ When Congress reviewed the situa-

⁴⁰ Act of March 3, 1901, 31 Stat. 1058, 1078 (Sisseton and Wahpeton Sioux); Act of March 3, 1909, 35 Stat. 781, 789 (Utes); Act of April 11, 1916, 39 Stat. 47 (Sisseton and Wahpeton Sioux); Act of May 26, 1920, 41 Stat. 623, 624 (Klamaths, etc.); Act of February 6, 1921, 41 Stat. 1097 (Osages); Act of March 13, 1924, 43 Stat. 21 (Blackfeet); Act of June 4, 1924, 43 Stat. 366 (Wichitas); Act of June 7, 1924, 43 Stat. 644 (Stockbridges); Act of January 9, 1925, 43 Stat. 729 (Poncas); Act of February 12, 1925, 43 Stat. 886; Act of May 14, 1926, 44 Stat. 555 (Chippewas); Act of July 2, 1926, 44 Stat. 801 (Pottawatomies); Act of July 3, 1926, 44 Stat. 807 (Crows); Act of March 2, 1927, 44 Stat. 1263 (Assiniboines); Act of March 3, 1927, 44 Stat. 1349 (Shoshones); Act of December 17, 1928, 45 Stat. 1027 (Winnebagos); Act of February 20, 1929, 45 Stat. 1249 (Nez Percés); Act of February 23, 1929, 45 Stat. 1256 (Coos, Bays); Act of February 23, 1929, 45 Stat. 1258 (Kansas Indians); Act of February 28, 1929, 45 Stat. 1407 (Northwestern Shoshones); Act of December 23, 1930, 46 Stat. 1033 (Warm Springs Indians); Act of March 3, 1931, 46 Stat. 1487 (Pillager Chippewas); Act of April 25, 1932, 47 Stat. 137 (Eastern and Western Cherokees); Act of June 19, 1935, 49 Stat. 388 (Alaska Indians); see also Act of March 4, 1917, 39 Stat. 1195, 1196 (Medawakanton and Wahpakoota Sioux); Act of February 11, 1920, 41 Stat. 404, 405 (Fort Berthold Indians); Act of June 3, 1920, 41 Stat. 738 (Sioux).

⁴¹ Act of July 1, 1902, 32 Stat. 716, 726 (Cherokees); Act of February 15, 1909, 35 Stat. 619 (Chippewas); Act of June 22, 1910, 36 Stat. 580 (Omahas); Act of June 25, 1910, 36

tion in 1935, it found that Indian claims then pending totalled almost \$3,000,000,000.00, about one-third of which were being litigated under jurisdictional acts which did not permit the offsetting of gratuitous expenditures. H. Rep. No. 1261, 74th Cong., 1st sess. Believing that gratuities should be deducted in all cases, Congress enacted the above-quoted provision, making it applicable not only to all suits thereafter filed, but to suits then pending in the Court of Claims which had not been tried or submitted.

The fact that Congress, in special jurisdictional acts prior to 1935, had provided for the offsetting of "gratuities" is important. As a result of these statutes the Court of Claims not only had had occasion to define gratuities in general terms as expenditures by the United States for the benefit of the Indians "in addition to appropriations and disbursements made in satisfaction of treaty or other obligations",⁴² but it also had recognized that certain specific types of expenditures were

Stat. 829 (Chippewas); Act of April 28, 1920, 41 Stat. 585 (Iowas); Act of March 19, 1924, 43 Stat. 27 (Cherokees); Act of May 20, 1924, 43 Stat. 133 (Seminoles); Act of May 24, 1924, 43 Stat. 139 (Creeks); Act of June 7, 1924, 43 Stat. 537 (Choctaws and Chickasaws); Act of March 3, 1925, 43 Stat. 1133 (Kansas Indians) (amended in 1929 to permit gratuity set-offs, 45 Stat. 1258).

⁴² *Blackfeet et al, Nations v. United States*, 81 C. Cls. 101, 115, 140-141; *Crow Nation v. United States*, 81 C. Cls. 238, 268 (March 4, 1935).

gratuities.⁴³ Congress must be presumed to have known (and in fact was actually advised⁴⁴) of those decisions when it directed the Court of Claims in the 1935 act to deduct gratuitous expenditures in all subsequent Indian cases. Cf. *Hecht v. Malley*, 265 U. S. 144, 153; *Latimer v. United States*, 223 U. S. 501, 504; *Sessions v. Romudka*, 145 U. S. 29, 42. In the course of our discussion of the items which are questioned in the present case we will have occasion to refer to the decisions of the Court of Claims prior to 1935 in which moneys expended for identical items were allowed as offsets.

• 1. *Finding 10* (R. 16-17 *Opinion*, R. 30-31; Br. 42-49).—Petitioner contends that the Court of

⁴³ *Kansas or Kaw Indians v. United States*, 80 C. Cls. 264, 295-296, 324-325 (1934); *Blackfeet et al. Nations v. United States*, 81 C. Cls. 101, 115, 140-141 (April 8, 1935). Laurence F. Schmeckebier, in a monograph on *The Office of Indian Affairs* (The Brookings Institution, 1927), divides appropriations for the Indian service into five general classes; (1) treaty stipulations; (2) gratuities; (3) tribal funds; (4) reimbursable, and (5) indefinite appropriation of reservation receipts (p. 509). A gratuity appropriation is defined as an appropriation "not based on any specific treaty or agreement, but in recognition of the general duty of the Government toward the Indians, to improve their social, physical, or economical condition" (p. 510). This monograph also contains a table showing the specific types of appropriations which are classed as gratuity appropriations (pp. 518-519). This table is reproduced in the Appendix at pp. 67-68.

⁴⁴ See Hearings before the Subcommittee of the Senate Committee on Appropriations, H. R. 8554, 74th Cong., 1st sess., pp. 106-107.

Claims erred in holding that the United States was entitled to an offset of \$165,847.17 on account of the purchase of land by the United States for gift to the Seminoles.

Pursuant to Article III of the Treaty of March 21, 1866, 14 Stat. 755, 756, the United States granted to petitioner a tract, situated between two streams, which was bounded on the east by the western boundary of the territory of the Creek Nation (at that time undetermined) and on the west by a line to be drawn at such a distance from the eastern boundary that the tract would embrace 200,000 acres. In the fall and winter of 1866, before the boundaries were located, the Seminoles moved to what was assumed to be the treaty land (R. 72). In 1868 one Rankin purported to survey the eastern boundary, *i. e.*, the dividing line between the Seminole and Creek territories. It appeared that some of the Seminoles had settled east of Rankin's line; after his survey they moved west of that line (R. 72). However, Rankin's survey was not approved, and in 1871 a survey made by Bardwell put the eastern boundary seven miles west of Rankin's line. Bardwell's survey was approved by the Secretary of the Interior in 1872. Territory east of the Bardwell line and consequently belonging to the Creeks was then occupied by the Seminoles, who had made substantial improvements thereon. Sen. Ex. Doc. No. 75, 47th Cong., 1st sess., pp. 5-6 (1882).

In order that the Seminoles might retain the Creek lands they had improved, Congress author-

ized the Secretary of the Interior to negotiate with the Creeks for the relinquishment of these lands. Act of March 3, 1873, 17 Stat. 626. On February 14, 1881, the Secretary entered into an agreement with the Creeks whereby the latter ceded to the United States land east of the Bardwell line, the agreement providing that the eastern boundary thereof should be drawn so that the ceded tract would aggregate 175,000 acres. See *Creek Nation v. United States*, 93 C. Cls. 561, 566.⁴⁵ The United States paid the Creeks \$175,000. Act of August 5, 1882, c. 390, 22 Stat. 257, 265. The tract became a part of the Seminole reservation and was disposed of either by allotment to the members of the tribe or by sale for account of the tribe (R. 16).

The Court of Claims arrived at the amount of offset as follows: It found that the United States paid the Creeks \$177,397.71 (R. 16).⁴⁶ It assumed

⁴⁵ The eastern boundary of these lands was drawn in 1888. It may be assumed that, as thus delineated, the tract comprised more than 175,000 acres. Whether the area was 177,397.71 acres (see R. 16, 30), or, as petitioner asserts (Br. 47) 176,198.99 acres, is immaterial in this case. The Creeks have sued the United States to recover compensation for the excess over 175,000 acres, but their petition was dismissed on the ground that the Creeks had intended to convey the whole tract for the consideration of \$175,000 and because cession of the whole was ratified by them in an agreement of January 19, 1889, Act of March 1, 1889, c. 317, 25 Stat. 757. *Creek Nation v. United States*, 93 C. Cls. 561.

⁴⁶ Actually, the amount paid was \$175,000, as is apparent from *Creek Nation v. United States*, *supra*, and the appropriation act of 1882.

upon the admission of the Government that the western boundary of the lands granted the Seminoles under the 1866 treaty had been so located in a Government-approved survey made in 1871 by Robbins that the tract contained only 188,449.46 acres, or 11,550.54 acres less than the 200,000 acres stipulated in the treaty (R. 31).⁴⁷ The Court then deducted 11,550.54 acres (shortage) from 177,397.71 acres and, pricing the difference at \$1.00 per acre, arrived at \$165,847.17 as the amount of the offset (R. 31).

We think that the amount of the offset was miscalculated. The gratuitous expenditure was \$175,000.00 and not, as the Court of Claims found, \$177,397.71. Further, we think that nothing should have been deducted from the gratuitous expenditure on account of a supposed shortage in or diminution of the lands covered by the 1866 treaty (see Br. 47).⁴⁸ Accordingly the gratuitous ex-

⁴⁷ The United States subsequently disposed of the land lying to the west of the Robbins line by patenting it in parcels to individuals of the Pottawatomie Tribe of Indians and to white settlers under the homestead laws. See Record, *Seminole Nation v. United States*, No. 830, this Term, p. 7.

⁴⁸ The Court of Claims made no finding that less than 200,000 acres was included within the boundary lines fixed by the United States. The question of such a possible shortage or diminution has been raised in another suit by the Seminoles to recover just compensation for the alleged taking by the Government of a strip of land west of the Robbins line. However, the Court of Claims did not there decide the existence or extent of deficiency, but dismissed the suit on the ground that the 175,000-acre grant more than compen-

penditure amounted to \$175,000.00 and not \$165,847.17.

Unquestionably the \$175,000.00 was gratuitously spent. Petitioner's argument to the contrary rests upon a mere assertion (Br. 42) that the expenditure was made to satisfy the Government's "liability" to compensate the Seminoles for improvements they made upon the lands.

The assertion is groundless. Liability would exist only if the Government had failed to fulfill some obligation imposed upon it by the 1866 Treaty, thereby causing damage to the Seminole Nation. But that treaty did not require the United States to remove the Seminoles to the ceded lands or, in advance of their arrival, to survey the boundaries in order that the Seminoles should not settle outside them. As a result, settlement of the Seminoles upon Creek lands did not constitute a treaty violation by the United States.

Petitioner does not contend otherwise. Rather it asserts (Br. 43, 44, 47-48) that after the treaty was made and after the Seminoles removed to

sated the Seminoles for any deficiency that might exist. On December 30, 1941, the Seminoles filed a petition for certiorari. *Seminole Nation v. United States*, No. 830, this Term. The Government there acquiesced in the granting of the petition, and is of opinion that the judgment of the Court of Claims should be reversed and the cause remanded with direction to determine the extent, if any, of the deficiency and award damages or compensation to petitioner if any be found due.

their supposed reservation, government agents promised that the United States would protect them in whatever improvements they might make upon the lands. However, as the Seminoles themselves recognized (R. 73), the men to whom they talked committed the Government only to the extent of their authority to do so, and it is not argued—and, of course, could not be—that any of them were empowered to treat with the Indians and make promises binding upon the United States. *Shoshone Tribe v. United States*, 299 U. S. 476, 494; *United States v. North American Co.*, 253 U. S. 330, 333. Cf. *Pawnee Indians v. United States*, 56 C. Cls. 1, 9, 13.

This is not to say that the Government was not justified in purchasing these lands and giving them to the Seminoles. But such a consideration does not transmute the expenditure for this purchase from a gratuity into the satisfaction of a liability. See *The Sac and Fox Indians*, 220 U. S. 481, 489; *Laughlin v. United States*, 44 C. Cls. 224, 241. It is plain that the Seminoles were given an additional 175,000 acres with the result that their reservation was nearly doubled in size."

"The Commissioner of Indian Affairs recommended to the Secretary of the Interior "that the agreement made in this city February 14, 1881, by the Creek Nation of Indians, ceding one hundred and seventy-five thousand acres of land in Indian Territory to the United States, being the land in question, for the sum of one hundred and seventy-five thousand dollars, be laid before Congress for ratification, and that that body be requested to make the necessary appropria-

In this connection, the Government invites the attention of the Court to congressional documents much stressed by petitioner (Br. 48). Sen. Ex. Doc. No. 75, 47th Cong., 1st sess. (1882); Sen. Ex. Doc. No. 126, 51st Cong., 1st sess. (1890). The first of these documents recommended the appropriation by Congress of the \$175,000.00 in question. It contains no suggestion that the Government was obliged to buy the lands for the Seminoles. The second document recommended that the Secretary of the Interior be authorized to negotiate with the Creeks for the purchase for the Seminoles of an additional 25,000 acres which had also been improved by the latter in the mistaken belief they were part of the 1866 grant. But if the authorization had been obtained, the Seminoles would have been required to pay the purchase price.⁵⁰ As the

tion to carry the same into effect; and that said lands be set apart for the use of the Seminole Nation of Indians, to be held by the same title as they now hold their land under the treaty of March 21, 1866, *whenever said Seminoles shall have relinquished to the United States in lieu thereof one hundred and seventy-five thousand acres of land from the western portion of their reserve in Indian Territory ceded to them by the treaty of 1866, and when said relinquishment shall have been approved by the Secretary of the Interior and recorded in the Office of Indian Affairs.*" [Italics supplied.] Sen. Ex. Doc. No. 75, 47th Cong., 1st sess., p. 2 (1882).

⁵⁰ A letter of transmittal from the President to Congress summarizes the proposed legislation as follows: "I transmit herewith a communication * * * from the Secretary of the Interior, and accompanying correspondence in the matter of the request of the Seminole Nation of Indians for

Commissioner of Indian Affairs stated to the Secretary of the Interior concerning this proposal: "The lands within the Creek Nation, upon which the Seminoles are now located, should unquestionably be purchased, but I do not think the United States is under any obligation to pay for the same." Sen. Ex. Doc. No. 126, 51st Cong., 1st sess., p. 5.²¹ Equally the United States had been

negotiations with the Creek Nation of Indians for the purchase of an additional quantity of land, being about 25,000 acres for the use of the Seminoles. The request is based upon the fact that former purchases did not embrace all of the lands upon which the Seminoles have made improvements, and which by the corrected survey were given to the Creeks. *The money to be paid for these lands is to be reimbursed the Government by the Seminoles.* [Italics supplied.] Sen. Ex. Doc. No. 126, 51st Cong., 1st sess. p. 1 (1890).

²¹ The Commissioner said (p. 4): "In a memorial dated February 12, 1890, the Seminole delegates state that at the time the 175,000 acres of land were purchased it was believed that quantity would cover all the lands occupied by the Seminoles, but that it was subsequently discovered that a large number of them were located and had improved farms on about 25,000 acres of Creek lands, not included in the said purchase, which lands they had continuously occupied since the ratification of the Treaty of 1866, or soon thereafter. In view of this fact they request the Secretary to open negotiations with the Creek Nation for the cession and relinquishment to the United States of the said 25,000 acres. They state that the homes and improvements of the Seminoles are worth vastly more than the lands upon which they are situated will cost; and that it is not the fault of the Seminoles that they were located upon Creek lands, nor that the negotiations under the Act of 1873 [17 Stat. 626, p. 74, *supra*] did not embrace all their improvements, they not having been consulted when said negotiations were con-

under no obligation to pay for the 175,000 acres bought in 1882, and the \$175,000.00 expended for the purchase was a gratuity. Accordingly, petitioner cannot complain of the allowance of an offset in the amount of \$165,847.17 (R. 39).

2. *Finding 11 (R. 17; Opinion, R. 31-34; Br. 53-61).*—Petitioner apparently concedes (see note 37, page 65, *supra*) that the items "Clothing", "Education", "Presents", and "Provisions and other rations" listed in Finding 11 were properly allowed by the Court of Claims. The items "Agency buildings and repairs" and "Expenses of delegates" were not allowed below (R. 32, 33), and need not be considered here (cf. Br. 54). This leaves in dispute the following six items: "Pay of Indian agents", "Miscellaneous agency expenses", "Fuel, light, and water", "Pay of interpreters", "Pay of miscellaneous employees", and "Transportation, etc. of supplies".

Prior to the enactment of the 1935 statute the Court of Claims had twice held that sums expended for the six purposes listed above were gratuity offsets. *Kansas or Kaw Indians v. United States*, 80 C. Cls. 264, 295-296, 324-325 (1934); *Blackfeet et al. Nations v. United States*; 81 C. Cls. 101, 137-138 (April 8, 1935).⁵² These decisions and the

cluded. * * * The lands within the Creek Nation, upon which the Seminoles are now located, should unquestionably be purchased, but I do not think that the United States is under any obligation to pay for the same."

⁵² For decisions by the Court of Claims to the same effect subsequent to approval of the act, see *Shoshone Tribe v.*

offsets there allowed were specifically called to the attention of Congress. Hearings, S. Committee on Appropriations (Subcommittee), H. R. 8554, 74th Cong., 1st sess., p. 107.⁵³ In fact, Senator Thomas proposed an amendment which would have prevented the Government from offsetting these and similar items. See *id.* at 32. Congress, however, adopted the language which it had used in the earlier special jurisdictional acts, then already construed by the Court of Claims. The gloss thus

United States, 82 C. Cls. 23, 55-59, 93-94 (December 2, 1935), 85 C. Cls. 331, 349-352, 357-358 (1937); *Choctaw & Chickasaw Nations v. United States*, 88 C. Cls. 271, 283 (1939); *Chippewa Indians of Minnesota v. United States*, 91 C. Cls. 97, 121-123, 136-137 (1940); *Choctaw Nation v. United States*, 91 C. Cls. 320, 347-357, 403-405 (1940), certiorari denied 312 U. S. 695. Cf. Schmeckebier, *The Office of Indian Affairs* (1927) 518-519, Appendix, pp. 67-68.

⁵³ The following table is reproduced from p. 107 of the Hearings cited in the text:

*Typical expenditures included by Court of Claims in
gratuity set-offs*

Case	Items	Amount
Crow, H-248	Education of Indian children	\$121,210.00
Do	Unspecified appropriations with no showing of benefit.	2,004,170.45
Blackfeet, E-427	Education at nonagency schools of individuals from the tribe.	250,100.46
Kaw, F-64	Clothing	7,466.83
Do	Agricultural equipment	3,694.68
Do	Medical attention	37,602.60
Do	Removal of Indians	805.76
Do	Education	170,697.18
Do	Pay of agents	31,188.31
Do	Pay of farmers	9,234.12
Do	Miscellaneous agency expenses.	9,461.68
Do	Expenses of appraising lands.	945.35
Do	Expense of joint agency on the basis of percentage of population.	72,159.51

adopted by Congress made expenditures for these purposes gratuities, in the absence of a controlling specific treaty provision.

Petitioner urges (Br. 54-55) that agents and interpreters were furnished to the Seminoles pursuant to specific treaty provisions. This is not the case. Ever since the Indian Trade and Inter-course Act of March 1, 1793, 1 Stat. 329, 331, it has been the consistent policy of Congress "in order to promote civilization among the friendly Indian tribes" to send agents to reside among them. Similarly it has been the practice of Congress to furnish an interpreter to each agency. Cf. Act of March 2, 1829, 4 Stat. 352; Act of June 30, 1834, 4 Stat. 735, 737. It is, of course, true that these services which are granted to all tribes as a matter of governmental policy might be secured to a particular tribe by treaty. And this may have been the situation with respect to the Seminoles between 1823 and 1834. The Seminoles, an off-shoot of the Creek Tribe, migrated to Florida subsequent to 1790.⁸⁴ By the Treaty of September 18, 1823, 7 Stat. 224, these Indians were given a tract of land which was described by metes and bounds and the United States agreed that "an agent, sub-agent, and interpreter, shall be appointed, to reside within the Indian boundary

⁸⁴ See Mills, *Lands of the Five Civilized Tribes* (1919), 151-153.

aforesaid."⁵⁵ This treaty remained in force until the Seminoles, by the Treaties of May 9, 1832, 7 Stat. 368, and March 28, 1833, 7 Stat. 423, agreed to migrate west of the Mississippi River and reunite with the Creeks. These new treaties by their very nature relieved the Government of its promise in the 1823 agreement to provide a separate agent and interpreter for the Seminoles. Accordingly, the Act of June 30, 1834, 4 Stat. 735, 736, ordered the Florida Agency discontinued, and the departmental regulations issued under that act in 1837 provided that the Creek Agency was to include the Seminoles. U. S. Indian Bureau Laws, etc., 1850, p. 19.

However, the reunion of the Creeks and Seminoles was shortlived. See Schmeckebier, *The Office of Indian Affairs* (1927) 100. In 1856, the Seminoles were given lands of their own. See Articles I and III of the Treaty of August 7, 1856, 11 Stat. 699, between the United States and the Creeks and the Seminoles. That treaty, after stating that all subsisting treaty stipulations between the Government and these tribes should "as far as practicable, be embodied in one comprehensive instrument", proceeded to enumerate (Article V) the treaty obligations which remained in force between the United States and the Creeks. Article

⁵⁵ Clearly, so far as petitioner is concerned, this treaty supplanted the Treaty of August 7, 1790, 7 Stat. 35, between the United States and the Creek Nation (cf. Br. 54).

VIII contains a comparable enumeration of the Government's obligations to the Seminoles. It is to be noted that the provisions with respect to agents and interpreters in the 1790 and 1823 treaties are not mentioned. Hence, the agents and interpreters furnished these tribes after 1856 were not required by specific treaty obligation but were furnished instead pursuant to the Government's general policy. Plainly the references to agents in Articles XV and XVII of the 1856 Treaty, relied on by petitioner (Br. 55-57), do not constitute a promise to maintain agents. Nor is any such promise to be found in the Treaty of March 21, 1866, 14 Stat. 755 (cf. Br. 56, 57). The general provisions to which petitioner refers (Br. 56) requiring the United States to make per capita payments, to provide rations, to distribute clothing, to survey boundaries, to erect a mill and other buildings, to keep out intruders, etc., are to be found in almost every Indian treaty. Notwithstanding such general provisions, it has, as we have seen (*supra*, page 80), been consistently held that moneys expended to compensate Indian agents who performed these and numerous other functions are gratuities.

- Since moneys spent for the pay of agents are gratuities, it follows that expenditures for "Miscellaneous agency expenses", "Fuel, light and water", "Pay of interpreters" and of "miscellaneous employees" of the agency, and "Trans-

portation, etc. of supplies" for the agency⁵⁶ are likewise gratuities.

3. *Finding 12* (R. 17; *Opinion*, R. 34-35; Br. 53-61).—Petitioner apparently admits (see note 37, page 65, *supra*) that the items "Education", "Expenses of delegations", "Feed and care of livestock", "Medical attention", and "Provisions and other rations" listed in Finding 12 were properly allowed as offsets. Thus, the only items covered by Finding 12 which petitioner disputes are precisely the same six items which were considered in Finding 11; no further argument concerning them is presented here.

4. *Finding 13* (R. 17; *Opinion*, R. 35-37, 41-42; Br. 64-73).—Petitioner admitted in the court below (R. 37) that the items "Clothing", "Expenses of delegates", "Livestock", "Medical attention", and "Provisions and other rations" listed in Find-

⁵⁶ The item of \$3,687.92 allowed in Finding 11 for "Transportation, etc., of supplies" possibly includes, in addition to charges for the transportation of agency supplies, and provisions and rations gratuitously furnished the Indians, charges for the transportation of supplies furnished the Seminoles pursuant to Article IX of the Treaty of August 7, 1856 (11 Stat. 699, 703). It is not believed that the cost of transporting to the Indians goods which the Government was by treaty obligated to give them can properly be made the basis of a gratuity offset. Accordingly, if the precise amount of this offset becomes material, a remand would be appropriate so that the Court of Claims can eliminate any transportation charges allocable to performance of the Government's obligation under Article IX of the 1856 Treaty.

ing 13 were proper offsets. The item "Education" was not allowed by the Court of Claims and need not now be considered. The items "Miscellaneous agency expenses" and "Pay of miscellaneous employees" have been dealt with in the discussion of Finding 11, *supra*, page 84.

There remain for consideration the following ten items: "Appraising", "Enrolling", "General office expenses", "Per capita payment expenses", "Preservation of records", "Probate expenses", "Protecting property interest", "Sale of townsites", "Surveying", "Surveying and allotting", and "Traveling expenses". The court below concluded that expenditures for those purposes were gratuitous. They represent expenditures incurred in substituting a system of individual ownership of land in severalty for the previous tribal ownership in common. The transformation was accomplished pursuant to an agreement with the Seminoles which contained no promise by the United States to pay the expenses attendant upon such a change in the tribal economy. Act of July 1, 1898, c. 542, 30 Stat. 567; Act of June 2, 1900, c. 610, 31 Stat. 250. This omission is significant in view of the fact that corresponding agreements with other members of the Five Civilized Tribes have contained express promises to pay particular portions of the expenses incident to the disposition of townsites and the allotment of tribal property in severalty. See Atoka agreement of June 28, 1898, 30 Stat. 495, 505, 509; Creek agreement of March

1, 1901, sec. 34, 31 Stat. 861, 871; Cherokee agreement of July 1, 1902, 32 Stat. 716, 724. The occasional appearance of these provisions for the defraying of expenses is indicative of an understanding by the parties that in the absence of such provisions the Indian tribes would pay the expenses entailed in carrying out the agreements; accordingly, these have been construed as not requiring the United States to bear expenses not expressly assumed by it. For example, in *Choctaw Nation v. United States*, 91 C. Cls. 320, 366, 367-371 (1940), certiorari denied, 312 U. S. 695, the claimant contended that the expenses of sale of the unallotted lands and other expenses incident to the carrying out of the Atoka and supplemental agreements should be borne by the United States. In rejecting that contention, the court said (pp. 368-371):

* * * This contention is an unusual one and becomes, we think, untenable in view of the course of legislation involving proceedings and matters of this precise character. When the government assumes the expenses involved in the management, control, and disposition of property of an Indian tribe, it generally provides for so doing, and we cannot infer a liability in this regard where the legislation concerned with the subject-matter deals specifically with the details of procedure and makes no mention of such an assumed liability. * * * [pp. 368-369.]

Plaintiff contends that any doubt as to whether the plaintiff or the government was to bear the expenses of administering the agreements and the expenses of sale of the unallotted lands and the coal and asphalt lands and deposits, such doubt should be resolved in favor of plaintiff and the defendant held to have assumed such obligations. But this contention, in view of the circumstances and the purposes which brought about the execution of the agreements and the purposes intended to be accomplished thereby, does not help the plaintiff here. * * * [p. 370.]

In the second place the government was deriving no pecuniary benefit under the agreements. No monetary consideration passed thereunder from the government to the Indians or from the Indians to the government. There was no cession by plaintiff of any property to the government, nor was there any surrender by plaintiff of any rights to the property which it owned or to the proceeds from any disposition thereof. The gross proceeds and revenue derived by plaintiff under the Atoka agreements and from royalties and revenue were at least \$24,800,000. If the agreements had been drawn so as to provide in all respects as they did, except that the affairs of the tribe should be managed, and its property controlled and disposed of in accordance with the terms agreed upon by the tribal government instead of the United States, it would be too clear for argument that the United States, at

whose instance the agreements were brought about as being for the best interests of the entire tribe, would not be obligated to bear any of the expenses. We think it is equally clear, when the agreements are interpreted in the light of their purpose due to existing conditions, that the assumption by the United States of control of the administration of the affairs of the tribe and the carrying out of the agreements did not impose upon it the obligation of paying all the expenses incident thereto. No instance in the history of Indian policy of the government is cited, and we find none, to show that the United States has, as a general policy, borne the expense of the distribution or sale of tribal property.

For these reasons we hold that the United States was not obligated under the agreements to bear the expenses incident to carrying out the provisions of the agreements and that the plaintiff is not entitled to recover the amounts herein claimed which were disbursed by the defendant from plaintiff's funds for such purposes. * * * [p. 371.]

Petitioner refers in the present case (Br. 65-68) to a group of "Propositions" made to the Seminoles by the Dawes Commission in 1894 at the outset of the negotiations which led to the agreement of July-1, 1898. (*supra*, page 49) to support its contention that the Government undertook to pay the expenses of executing the agreement. However, mere offers made by the Commission in the

preliminary stages of negotiation could bind neither party. The fact that the substance of the second proposal on which petitioner particularly relies was not embodied in the final agreement points positively against petitioner's contention. It would, therefore, seem that the court below properly followed its prior decision in *Choctaw Nation v. United States, supra*, in holding that the United States was under no legal obligation to pay the expenses incident to the distribution in severalty of tribal property, and that such expenditures were therefore gratuitous in character.

5. *Findings 14, 15 and 16 (R. 18-19; Opinion, R. 37-38; Br. 53-61).*—What has been said earlier, in the discussion of Finding 11, page 84, *supra*, with respect to "Miscellaneous agency expenses", "Pay of miscellaneous employees", "Pay of interpreters", and "Transportation, etc. of supplies"⁸⁷ is equally applicable here.

Inasmuch as an examination of the supplemental report of the General Accounting Office (p. 53) shows that the "Annuity expenses" listed in Finding 15 were incurred in 1867, it would seem that this expenditure should not have been allowed as a gratuity offset; it was not until 1879 (see page 47, *supra*) that the tribe itself undertook the responsibility of making annuity payments to its members. Hence, the Government admits that

⁸⁷ This item is possibly subject to the same infirmity as the similar item in Finding 11 discussed in note 56, p. 85, *supra*.

the gratuity offset of \$513.74 allowed with respect to Findings 14 and 15 together (R. 39, 42) should be reduced to \$316.24.

It is to be noted that the expenditures listed in Findings 14 and 15 were made jointly for the benefit of the Seminoles and the Creeks, the court below determining the offset allocable to the Seminoles on the basis of proportionate population. It is not clear whether petitioner challenges that method of allocation here (see Br. 49, 53, 73, 74, 79). If such be petitioner's intention, it is to be observed that the practice of allocating on the basis of proportionate population expenditures made jointly for two or more tribes was sanctioned by this Court prior to the passage of the Act of August 12, 1935, and has been consistently followed by the Court of Claims. *The Sisseton and Wahpeton Indians*, 208 U. S. 561, 567, affirming 42 C. Cls. 416, 429 (1907); *Duwamish et al. Indians v. United States*, 79 C. Cls. 530, 560-564 (1934); *Kansas or Kaw Indians v. United States*, 80 C. Cls. 264, 296, 324 (1934); *Blackfeet et al. v. United States*, 81 C. Cls. 101, 115-116 (April 8, 1935); *Shoshone Tribe of Indians v. United States*, 82 C. Cls. 23, 57-59, 92 (December 2, 1935), 85 C. Cls. 331, 350-353, 358 (1937); *Eastern or Emigrant Cherokees v. United States*, 82 C. Cls. 180, 192-196 (December 2, 1935); *Choctaw Nation v. United States*, 91 C. Cls. 320, 353-354, 357 (1940). This practice had been brought to the attention of Con-

gress when it enacted the 1935 statute. Hearings, Committee on Appropriations (Subcommittee), H. R. 8554, 74th Cong., 1st sess., p. 107; see last item in table reproduced in note 53, page 81, *supra*.⁵⁸

6. *Finding 17* (R. 19; *Opinion*, R. 38; Br. 53-64).—Petitioner apparently does not contest (see note 37, page 65, *supra*) the items "Agricultural implements and equipment", "Feed and care of livestock", "Livestock", "Medical attention", and "Pay and expenses of farmers". Our argument with respect to *Finding 11* (page 84, *supra*) is equally directed to show that the items here of "Pay of Indian agents", "Pay of miscellaneous employees", "Pay of skilled employees", "Miscellaneous agency expenses", "Fuel, light and water", and "Hardware, glass, oil and paints" were properly allowed. This leaves for further consideration two items, namely, "Pay and expenses of Indian police" and "General office expense".

a. Petitioner argues that the United States was obliged by treaty to remove intruders from the Seminole country and asserts that the Indian police force was organized for this purpose (Br. 60). We

⁵⁸ What is said in the text with respect to propriety of the method of allocation here employed by the Court of Claims applies with like force to the similar practice of the court below in allocating to the Seminoles a portion of the expenditures made gratuitously by the Government for the Five Civilized Tribes, which are covered by Findings 17 and 18.

think this is not the case. The Indian police force was established by the Act of May 27, 1878, 20 Stat. 63, 86, which provided that it was "to be employed in maintaining order and prohibiting illegal traffic in intoxicating liquor on the several Indian reservations." The many and varied duties performed by the Indian police are summarized in the Report of the Commissioner of Indian Affairs for 1880 at pages ix-xii. In addition to removing intruders, the Indian police were to "act as guards at annuity payments; render assistance and preserve order during ration issues; protect agency buildings and property; return truant pupils to school; search for and return lost or stolen property, whether belonging to Indians or white men; prevent depredations on timber, and the introduction of whiskey on the reservation; bring whiskey-sellers to trial; make arrests for disorderly conduct, drunkenness, wifebeating, theft, and other offenses; serve as couriers and messengers; keep the agent informed as to births and deaths in the tribe, and notify him promptly as to the coming on the reserve of any strangers, white or Indian." See also Regulations of the Indian Department, 1884, pp. 106-110; Schmeckebier, *The Office of Indian Affairs* (1927) 262-263. These latter were functions for the performance of which the Seminoles themselves would otherwise have provided, and the United States was under no obligation to pay salaries to members of the Seminole tribe for performing such

police duties. Accordingly, as the court below held, money paid for the expenses of Indian police was spent by the United States gratuitously.

b. The item "General office expense" in Finding 17 is, as petitioner points out (Br. 62-64), an expenditure incurred by the Dawes Commission prior to July 1, 1898.³⁹ That the Government was under no legal obligation to establish the Dawes Commission is not open to dispute. Therefore, the only question which can arise, in determining whether the expenditures of the Commission should be deducted as a gratuity, is whether these sums were expended "for the benefit" of the Seminole Nation.

The Dawes Commission was originally established for the sole purpose of negotiating agreements with the Five Civilized Tribes with a view to transforming their system of tribal ownership of land into one of individual ownership. Act of March 3, 1893, sec. 16, 27 Stat. 612, 645; see Report of the Secretary of the Interior, 1895, p. xciv; *id.*, 1898, p. xxix. But the Commission was soon given additional duties. In 1896 and 1897 it was directed to prepare tribal rolls without which no allotment in severalty would be possible. Act of June 10, 1896, 29 Stat. 321, 339-340; Act of June 7, 1897, 30 Stat. 62, 84; see Cohen, *Handbook of Federal*

³⁹ "General office expenses" incurred by the Dawes Commission after ratification of the Seminole Agreement on July 1, 1898, 30 Stat. 567, stand on a different footing. See pp. 86-90, *supra*, and p. 95, *infra*.

Indian Law (1941) 431; Report of the Secretary of the Interior, 1896, p. cl.

It thus appears that a portion of the item now under discussion was expended in negotiating agreements with the Five Tribes and that a portion was expended in preparing tribal rolls, the amount for each purpose not being shown separately by the present record. See Report of the Secretary of the Interior, 1896, pp. cliii, clv; *id.*, 1897, pp. cxx-cxxi; *id.*, 1898, p. xxxi. The Government concedes that the portion of this item expended in the negotiation of agreements with the Five Tribes should not have been offset. However, we believe that the Government is entitled to a credit for expenses incurred by the Commission in preparing the rolls which, with subsequent additions and corrections, served as a basis for the allotment of tribal property among individual Indians after 1898. Cf. *Choctaw Nation v. United States*, *supra*; see pages 86-90, *supra*. Therefore, if computation of the amount allocable to expenditure for each of these purposes separately becomes important in this case, the matter should be remanded to the Court of Claims with directions to make the necessary determination.

7. *Finding 18* (R. 19-20; *Opinion*, R. 37-38; Br. 73-85).—Petitioner states (Br. 74) that the Government in the Act of July 1, 1898, 30 Stat. 567, agreed to individualize the land holdings of the Seminole Nation and to pay the expenses of admin-

istration. Petitioner then asserts (Br. 75) that the following items were either directly or incidentally disbursed pursuant to that agreement:

Allotting	Miscellaneous agency expenses	Provisions and other rations
Appraising	Oil and gas expenses	Purchase of horses
Appraising and selling lands	Oil and gas mining supervision, allotted lands	Removal of alienation restrictions
Appraisal and sale of restricted land	Pay and expenses of Indian police	Sale of allotted lands
Automobiles and repairs	Pay of Indian agents	Sale of restricted lands
Copying allotment records	Pay of clerks	Sale of town lots
Equalization of allotments expenses	Pay of Indian inspectors	Sale of town sites
Examining records in disputed citizenship cases	Pay of interpreters	Sale of unallotted lands
Feed and care of the horses	Pay of miscellaneous employees	Surveying
Fuel, light, and water	Pay of superintendents	Surveying and allotting
General office expenses	Per capita payment expenses	Surveying segregated coal and asphalt lands
Household equipment	Preservation of records	Surveying, sale, etc., of lands
Incidental expenses	Protecting property interest of restricted members	Timber estimating
Investigating leases		Transportation, etc., of supplies
Leasing of mineral and other lands		Traveling expenses

Petitioner therefore concludes that these items should not have been allowed as gratuity offsets. But, as we have urged (*supra*, page 90), the Government did not agree to pay any part of the expenses incident to the allotment in severalty of Seminole tribal land. Moreover, many of the items listed by petitioner, *e. g.*, "Pay of Indian agents", "Pay of interpreters", "Pay and expenses of Indian police", are not attributable to the allotment program but were expenditures made pursuant to the Government's general policy of providing such services to Indian tribes. As we have shown in the discussion of Findings 11 and 17 (*supra*, pages 80-85, 92-95) such expenditures are gratuities.

The next item of which petitioner complains (Br. 76-77) is an expenditure of \$2,179,846.86 for "Education". It is urged that this item is erroneous insofar as it includes \$1,693,525.90 spent for the maintenance of the Cherokee Orphans Training School. We think the allowance of this expenditure was proper because the industrial school in question was maintained "for the orphan Indian children of the Five Civilized Tribes". Section 18 of the Act of June 30, 1913, 38 Stat. 77, 95. The fact that there happened to be no Seminole orphans actually in attendance during the years when this money was spent is not material.

Petitioner is under a misapprehension when he argues that the item of \$2,179,846.86 includes \$95,758.84 spent in "aid of common schools" of the State of Oklahoma. Except for an expenditure of \$2,569.00 in 1934, all moneys expended "in aid of common schools" have been excluded from the gratuity offset claim of \$2,179,846.86 for "Education".⁶⁰ Furthermore, expenditures in "aid of common schools" are proper gratuity offsets; money expended to make possible the education of Indian children in the public schools of Oklahoma redounded to the benefit of the tribe. Cf. *Blackfeet et al. Nations v. United States*, 81 C. Cls. 101, 138-139, 140-141 (1935); *Shoshone Tribe of In-*

⁶⁰ A breakdown of this item, taken from the Supplemental Report of the General Accounting Office, is printed in the Appendix, pp. 65-66.

dians v. United States, 82 C. Cls. 23, 56, 59 (1935); 85 C. Cls. 331, 349-350, 352, 357 (1937).

The remaining items in Finding 18 are challenged by petitioner principally on the ground that they were expended directly for the use of individual Indians rather than of the tribe as a whole (Br. 77-85). But an expenditure by the United States of funds, for agricultural aid, for hospitals, and for probate expenses, immediately benefiting individuals of the Seminole Nation, according to need, is an expenditure for a public purpose advancing the general welfare. Cf. *Carmichael v. Southern Coal Co.*, 301 U. S. 495, 518; *Cochran v. Board of Education*, 281 U. S. 370, 375. The dictum in *Osage Tribe of Indians v. United States*, 66 C. Cls. 64, 82, upon which petitioner relies (Br. 77), to the effect that expenditures for the education of individual Indians at nonagency schools was not a proper offset (under a special jurisdictional statute) against the tribe as a whole, has since been repudiated. *Blackfeet et al. Nations v. United States*, 81 C. Cls. 101, 138-139, 140-141 (April 8, 1935).

This constructional history was before Congress when it passed the 1935 act. See page 72, *supra*. If moneys expended for the education of individual Indians at nonagency schools are proper gratuity offsets against a tribe of Indians, it follows that expenditures in the cases of individuals for agricultural aid, hospitalization, and probate expenses are similarly chargeable against

the tribe. The Court of Claims has uniformly so held. *Choctaw Nation v. United States*, 91 C. Cls. 320, 354-356 (1940), certiorari denied 312 U. S. 695; *Chippewa Indians v. United States*, 91 C. Cls. 97, 121-128 (1940); *Choctaw & Chickasaw Nations v. United States*, 88 C. Cls. 271, 283 (1939); *Shoshone Tribe of Indians v. United States*, 82 C. Cls. 23, 56, 59 (1935); 85 C. Cls. 331, 349-350, 352, 357 (1937); Cf. Schmeckebier, *The Office of Indian Affairs* (1929), pp. 518-519 (Appendix, pp. 67-68).

8. *Finding 19* (R. 20; *Opinion*, R. 38; Br. 85-86).—The court held in *Finding 17* that a total of \$305,292.80 had been gratuitously spent by the Government for the benefit of the Five Tribes during the period from 1867 to 1898, and in *Finding 18* that \$11,416,066.55 had been similarly expended from 1899 to 1934 (R. 19-20). In *Finding 19* the court concluded that between 1861 and 1897 the Seminoles composed approximately 4.38 percent of the population of the Five Tribes, and that between 1908 and 1928 about 3.08 percent (R. 20). No finding was made with respect to the proportionate population of each of these tribes during the periods from 1898 to 1907 and from 1929 to 1934. The court did, however, make a finding that during the entire period from 1861 to 1928 the Seminoles composed 3.72 percent of the Five Tribes. On the basis of this finding the court allowed the Government an offset of 3.72 percent of the moneys gratuitously expended by it for the

benefit of the Five Tribes from 1867 to 1934 (R. 42).⁶¹

Petitioner objects (Br. 85-86) to the use of this average figure of 3.72 percent in determining the amount of gratuity offsets chargeable against the Seminoles for the period covered by Finding 18 (1899 to 1934); it contends (Br. 86) that any offsets properly allowable in this finding should be computed at the lower percentage figure of 3.08.⁶² Since the court made specific findings respecting the population of these tribes for different periods before and after 1898, we agree that it would have been more accurate to compute the gratuity offsets in Finding 17 (1867 to 1898) on a percentage basis of 4.38, and those in Finding 18 (1899 to 1934) on a percentage basis of 3.08 (or whatever the correct percentage may be for the entire period from 1899 to 1934 if it is not 3.08). Should the precise amount of the gratuity offsets allowed by the Court of Claims in Findings 17 and 18 become important, we suggest that they be calculated on the basis of the figures just referred to, or if the finding of a population ratio of 3.08 for the period from 1908 to

⁶¹ Petitioner, in addition to challenging the court's derivation and use of percentages, contends that any allocation of the gratuities listed in Finding 18 to the Seminoles is improper without proof that the amounts charged to the Seminole Nation were actually expended for the tribe or for individual Seminoles. The practice followed here by the Court of Claims has been sanctioned by this Court and has received the implied approval of Congress. A discussion of this point appears earlier in our brief, at pp. 91-92, *supra*.

⁶² Presumably, if the figure of 3.08 be adopted as to Finding 18, the figure of 4.38 would then be used for the period covered by Finding 17 (1867 to 1898).

1928 is thought insufficiently approximate to represent the entire period from 1899 to 1934, that the matter be remanded with directions to make more complete findings.

CONCLUSION

The Court of Claims correctly determined that the Government's liability to the Seminole Nation on all of the five items of its claim is \$18,388.30. Petitioner concedes that the Government has proper offsets in excess of that amount. The judgment of the court below dismissing the petition should therefore be affirmed. In the event that this Court should find that the United States is liable in an amount, probably⁶³ exceeding the admitted offsets, we urge that the cause be remanded to the Court of Claims, with directions to strike a balance of accounts between the United States and the Seminole Nation and to specify which gratuity offsets are exhausted to cancel the Government's liability to petitioner.

Respectfully submitted.

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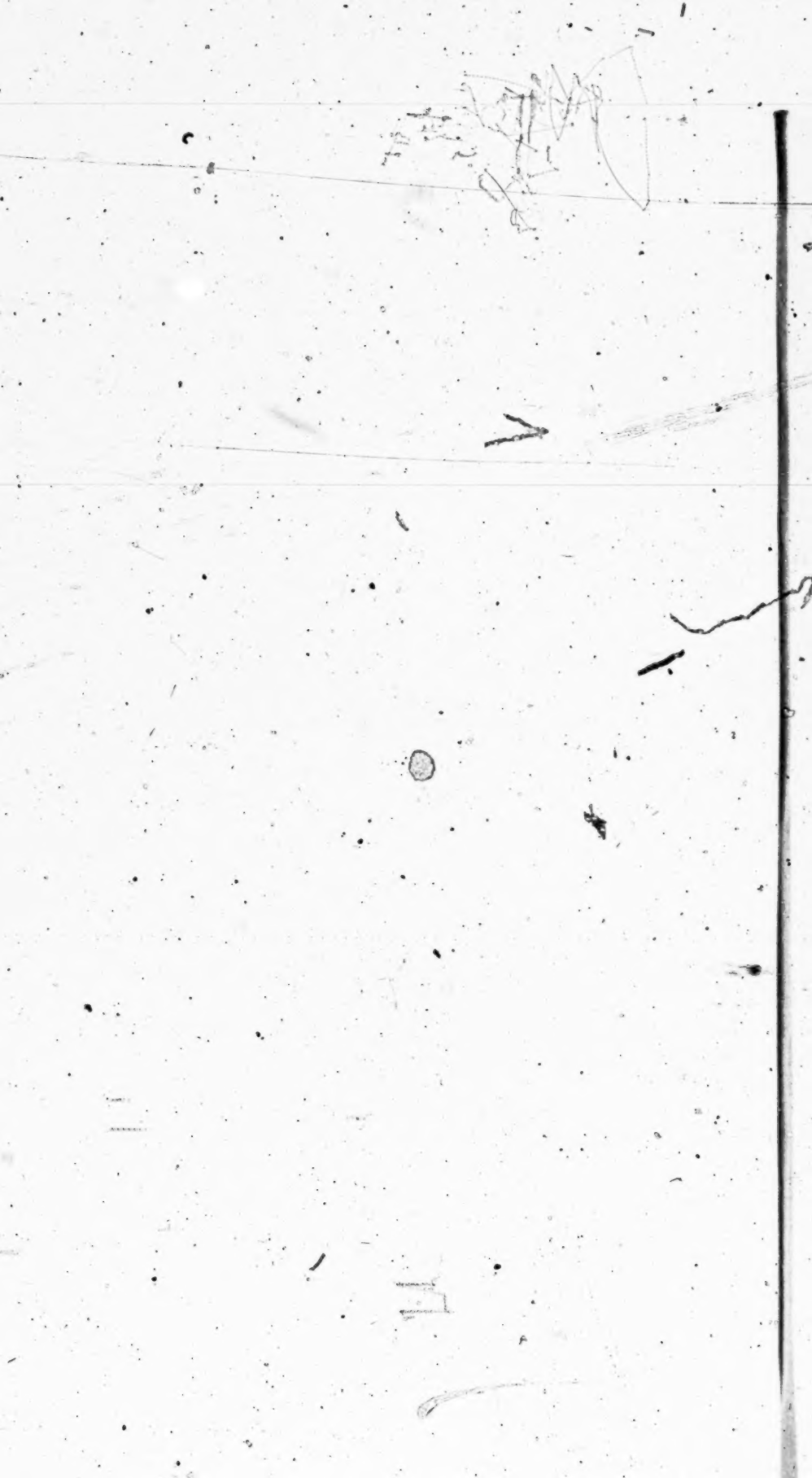
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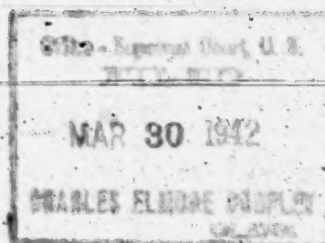
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MARCH 1942.

⁶³ See n. 38, pp. 67-68, *supra*.



FILE COPY



No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

ON WRIT OF CERTIORARI TO THE COURT OF CLAIMS

APPENDIX TO BRIEF FOR THE UNITED STATES

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PART I. TREATIES AND STATUTES

TREATY OF AUGUST 7, 1856, BETWEEN THE UNITED STATES AND THE CREEK AND SEMINOLE TRIBES OF INDIANS, 11 STAT. 699, 700-702.

Whereas the convention heretofore existing between the Creek and Seminole tribes of Indians west of the Mississippi River, has given rise to unhappy and injurious dissensions and controversies among them, which render necessary a readjustment of their relations to each other and to the United States; and whereas the United States desire, by providing the Seminoles remaining in Florida with a comfortable home west of the Mississippi River, and by making a liberal and generous provision for their welfare, to induce them to emigrate and become one people with their brethren already west, and also to afford to all the Seminoles the means of education and civilization, and the blessings of a regular civil government; and whereas, the Creek nation and individuals thereof, have, by their delegation, brought forward and persistently urged various claims against the United States, which it is desirable shall be finally adjusted and settled; and whereas it is necessary for the simplification and better understanding of the relations between the United States and said Creek and Seminole tribes of Indians, that all their subsisting treaty stipulations shall, as far as practicable, be embodied in one comprehensive instru-

ment; now therefore, the United States, by their commissioner, George W. Manypenny, the Creek tribe of Indians, by their commissioners, Tuck-a-batchee-Micco, Echo-Harjo, Chilly McIntosh, Benjamin Marshall, George W. Stidham, and Daniel N. McIntosh; and the Seminole tribe of Indians, by their commissioners, John Jumper, Tuste-nuc-
o-
chee, Pars-co-fer, and James Factor, do hereby agree and stipulate as follows, viz:

ARTICLE I. The Creek Nation doth hereby grant, cede, and convey to the Seminole Indians, the tract of country included within the following boundaries, viz: beginning on the Canadian River, a few miles east of the ninety-seventh parallel of west longitude where Ock-hi-appo, or Pond Creek, empties into the same; thence, due north to the north fork of the Canadian; thence, up said north fork of the Canadian to the southern line of the Cherokee country; thence, with that line, west, to the one hundredth parallel of west longitude; thence, south along said parallel of longitude to the Canadian River, and thence down and with that river to the place of beginning.

ARTICLE V. The Creek Indians do hereby, absolutely and forever, quitclaim and relinquish to the United States all their right, title, and interest in and to any lands heretofore owned or claimed by them, whether east or west of the Mississippi River, and any and all claim for or on account of any such lands, except those embraced within the boundaries described in the second article of this agreement; and it doth also, in like manner, release and fully discharge the United States from all

other claims and demands whatsoever, which the Creek Nation or any individuals thereof may now have against the United States, excepting only such as are particularly or in terms provided for and secured to them by the provisions of existing treaties and laws; and which are as follows, viz: permanent annuities in money amounting to twenty-four thousand five hundred dollars, secured to them by the fourth article of the treaty of seventh August, seventeen hundred and ninety,³ the second article of the treaty of June sixteenth, eighteen hundred and two, and the fourth article of the treaty of January twenty-fourth, eighteen hundred and twenty-six; permanent provision for a wheelwright, for a blacksmith and assistant; blacksmith shop and tools, and for iron and steel under the eighth article of the last-mentioned treaty; and costing annually one thousand seven hundred and ten dollars; two thousand dollars per annum, during the pleasure of the President, for assistance in agricultural operations under the same treaty and article; six thousand dollars per annum for education for seven years, in addition to the estimate for present fiscal year, under the fourth article of the treaty of January fourth, eighteen hundred and forty-five; one thousand dollars per annum during the pleasure of the President, for the same object, under the fifth article of the treaty of February fourteenth, eighteen hundred and thirty-three; services of a wagon maker, blacksmith and assistant, shop and tools, iron and steel, during the pleasure of the President, under the same treaty and article, and costing one thousand seven hundred and ten dollars annually; the last instalment of two thousand two hundred and twenty dollars

for two blacksmiths and assistants, shops and tools, and iron and steel, under the thirteenth article of the treaty of March twenty-fourth, eighteen hundred and thirty-two, and which last it is hereby stipulated shall be continued for seven additional years. * * *

ARTICLE VIII. The Seminoles hereby release and discharge the United States from all claims and demands which their delegation have set up against them, and obligate themselves to remove to and settle in the new country herein provided for them as soon as practicable. In consideration of such release, discharge, and obligation, and as the Indians must abandon their present improvements, and incur considerable expense in reestablishing themselves, and as the government desires to secure their assistance in inducing their brethren yet in Florida to emigrate and settle with them west of the Mississippi River, and is willing to offer liberal inducements to the latter peaceably so to do, the United States do therefore agree and stipulate as follows, viz: To pay to the Seminoles now west, the sum of sixty¹ thousand dollars, which shall be in lieu of their present improvements, and in full for the expenses of their removal and establishing themselves in their new country; to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops among them, said sums

¹ See Amendment, substituting ninety for sixty, *post*, p. 706.

to be applied to these objects in such manner as the President shall direct. Also to invest for them the sum of two hundred and fifty thousand dollars, at five percent. per annum, the interest to be regularly paid over to them *per capita* as annuity; ² the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested, shall constitute a fund belonging to the united tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; but no portion of the principal thus invested, or the interest thereon annually due and payable, shall ever be taken to pay claims or demands against said Indians, except such as may hereafter arise under the intercourse laws.

RESOLUTION OF FEBRUARY 22, 1862, NO. 13,
12 STAT..614

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the Secretary of the Interior be authorized to pay out of the annuities payable to the Seminoles, Creeks, Choctaws, and Chickasaws, and which have not been paid, in consequence of the cessation of intercourse with those tribes, so much of the same as may be necessary to be applied to the relief of such portions of said tribes as have remained loyal to the United States, and have been

² Amended by the Act of April 15, 1874, 18 Stat. 29 (pp. 16-17, *infra*) and the Act of the Seminole legislature dated April 2, 1879 (pp. 43-44, *infra*.)

or may be driven from their homes in the Indian Territory into the State of Kansas or elsewhere.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1863,
ACT OF JULY 5, 1862, C. 135, 12 STAT. 512, 528

For defraying the expenses of the removal and subsistence of Indians in Oregon and Washington Territory (not parties to any treaty) and for pay of necessary employees, fifty thousand dollars: *Provided*, That all appropriations heretofore or hereafter made to carry into effect treaty stipulations, or otherwise, in behalf of any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, may and shall be suspended and postponed wholly or in part at and during the discretion and pleasure of the President: *Provided, further*, That the President is authorized to expend such part of the amount heretofore appropriated and not expended and hereinbefore appropriated for the benefit of the tribes named in the preceeding proviso as he may deem necessary, for the relief and support of such individual members of said tribes as have been driven from their homes and reduced to want on account of their friendship to the government. And an account shall be kept of the sums so paid for the benefit of such tribe, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth, shall be made on advertisement, as provided in other cases, and an account shall be rendered of

all such purchases, with a statement of the prices paid therefor: *And provided, further,* That in cases where the tribal organization of any Indian tribe shall be in actual hostility to the United States, the President is hereby authorized, by proclamation, to declare all treaties with such tribe to be abrogated by such tribe, if, in his opinion, the same can be done consistently with good faith and legal and national obligations.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1864,
ACT OF MARCH 3, 1863, C. 99, 12 STAT. 774, 793

SEC. 3. *And be it further enacted,* That the Secretary of the Interior be, and he is hereby authorized to expend such part of the amount heretofore appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom shall be in a state of actual hostility to the Government of the United States, including the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as may be found necessary to enable such individual members of said tribes as have been driven from their homes, and reduced to want on account of their friendship to the United States, to subsist until they can be removed to their homes, and to assist them in such removal: *Provided,* That an account shall be kept of the sums so paid for the benefit of the said members of said tribes, which account shall be rendered to Congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth shall be made of the lowest responsible bidder, after sufficient public notice by advertisement

in appropriate newspapers: *Provided, also,* That the said Secretary shall not be required to accept any bid which is in his judgment unreasonable in its character.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1865,
ACT OF JUNE 25, 1864, C. 148, 13 STAT. 161, 180

SEC. 2. *And be it further enacted,* That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount herein appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all, or any portion of whom, shall be in a state of actual hostility to the government of the United States, including the Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as well as the Cherokees, as may be found necessary to support such individual members of said tribes as have been driven from their homes or reduced to want on account of their friendship to the United States, and enable them to subsist until they can support themselves in their own country: *Provided,* That an account shall be kept of the sums so paid for the benefit of the said members of said tribes, which account shall be rendered to congress at the commencement of the next session thereof. And all purchases of articles for the purposes above set forth shall be made of the lowest responsible bidder, after sufficient public notice by advertisement in appropriate newspapers: *Provided, also,* That the said secretary shall not be required to accept any bid which is in his judgment unreasonable in its character: *Provided, further,* That no part of said annuities shall be expended for In-

dians outside of the Indian Territory south of Kansas, except in providing for such individual Indians or families as are sick and unable to remove to that territory, or such as may be driven out of that territory by armed rebels, after the passage of this act.

INDIAN APPROPRIATION ACT FOR THE FISCAL YEAR 1866,
ACT OF MARCH 3, 1865, C. 127, 13 STAT. 541, 562

SEC. 5, *And be it further enacted*, That the Secretary of the Interior be, and he is hereby, authorized to expend such part of the amount herein appropriated to carry into effect any treaty stipulation with any tribe or tribes of Indians, all or any portion of whom shall be in a state of actual hostility to the government of the United States, including the Creeks, Choctaws, Chickasaws, Seminoles, Wichitas, and other affiliated tribes, as well as the Cherokees, as may be found necessary to support such individual members of said tribes as have been driven from their homes or reduced to want on account of their friendship to the United States; and enable them to subsist until they can support themselves in their own country: *Provided*, That an account shall be kept of the sums so paid for the benefit of the said members of said tribes, which account shall be rendered to congress, at the commencement of the next session thereof, and all the purchases of articles for the purposes above set forth, shall be made of the lowest responsible bidder after sufficient public notice by advertisement in appropriate newspapers: *Provided, also*, That the said Secretary shall not be required to accept any bid which is in his judgment unrea-

sonable in its character: *Provided, further*, That no part of said annuities shall be expended for Indians outside of the Indian Territory south of Kansas, except in providing for such individual Indians or families as are sick and unable to remove to that territory, or such as may be driven out of that territory by armed rebels, after the passage of this act.

TREATY OF MARCH 21, 1866, BETWEEN THE UNITED STATES AND THE SEMINOLE NATION, 14 STAT. 755, 756

PREAMBLE

Whereas existing treaties between the United States and the Seminole nation are insufficient to meet their mutual necessities; and whereas the Seminole nation made a treaty with the so-called confederate states, August 1st, 1861, whereby they threw off their allegiance to the United States, and unsettled their treaty relations with the United States, and thereby incurred the liability of forfeiture of all lands and other property held by grant or gift of the United States; and whereas a treaty of peace and amity was entered into between the United States and the Seminole and other tribes at Fort Smith, September 10, 1865, whereby the Seminoles revoked, cancelled, and repudiated the said treaty with the so-called confederate states; and whereas the United States, through its commissioners, in said treaty of peace, promised to enter into treaty with the Seminole nation to arrange and settle all questions relating to and growing out of said treaty with the so-called confederate states; and whereas the United States, in view of said treaty of the Seminole nation with the enemies

of the government of the United States, and the consequent liabilities of said Seminole nation, and in view of its urgent necessities for more lands in the Indian territory, requires a cession by said Seminole nation of a part of its present reservation, and is willing to pay therefor a reasonable price, while at the same time providing new and adequate lands for them.

Now, therefore, the United States, by its commissioners aforesaid, and the above-named delegates of the Seminole nation, the day and year above written, mutually stipulate and agree, on behalf of the respective parties, as follows, to wit:

* * * * *

ARTICLE III. In compliance with the desire of the United States to locate other Indians and freedmen thereon, the Seminoles cede and convey to the United States their entire domain, being the tract of land ceded to the Seminole Indians by the Creek nation under the provisions of article first (1st), treaty of the United States with the Creeks and Seminoles, made and concluded at Washington, D. C., August 7, 1856. In consideration of said grant and cession of their lands, estimated at two million one hundred and sixty-nine thousand and eighty (2,169,080) acres, the United States agree to pay said Seminole nation the sum of three hundred and twenty-five thousand three hundred and sixty-two (\$325,362) dollars, said purchase being at the rate of fifteen cents per acre. The United States having obtained by grant of the Creek nation the westerly half of their lands, hereby grant to the Seminole nation the portion thereof hereafter described, which shall constitute the na-

tional domain of the Seminole Indians. Said lands so granted by the United States to the Seminole nation are bounded and described as follows, to wit: Beginning on the Canadian river where the line dividing the Creek lands according to the terms of their sale to the United States by their treaty of February 6, 1866, following said line due north to where said line crosses the north fork of the Canadian river; thence up said north fork of the Canadian river a distance sufficient to make two hundred thousand acres by running due south to the Canadian river; thence down said Canadian river to the place of beginning. In consideration of said cession of two hundred thousand acres of land described above, the Seminole nation agrees to pay therefor the price of fifty cents per acre, amounting to the sum of one hundred thousand dollars, which amount shall be deducted from the sum paid by the United States for Seminole lands under the stipulations above written. The balance due the Seminole nation after making said deduction, amounting to one hundred thousand dollars, the United States agree to pay in the following manner, to wit: Thirty thousand dollars shall be paid to enable the Seminoles to occupy, restore, and improve their farms, and to make their nation independent and self-sustaining, and shall be distributed for that purpose under the direction of the Secretary of the Interior; twenty thousand dollars shall be paid in like manner for the purpose of purchasing agricultural implements, seeds, cows; and other stock; fifteen thousand dollars shall be paid for the erection of a mill suitable to accommodate said nation of Indians; seventy thousand dollars to remain in the United States treasury,

upon which the United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; forty thousand three hundred and sixty-two dollars shall be appropriated and expended for subsisting said Indians, discriminating in favor of the destitute; all of which amounts, excepting the seventy thousand dollars, to remain in the treasury as a permanent fund, shall be paid upon the ratification of said treaty, and disbursed in such manner as the Secretary of the Interior may direct. The balance, fifty thousand dollars, or so much thereof as may be necessary to pay the losses ascertained and awarded as hereinafter provided, shall be paid when said awards shall have been duly made and approved by the Secretary of the Interior. And in case said fifty thousand dollars shall be insufficient to pay all said awards, it shall be distributed pro rata to those whose claims are so allowed; and until said awards shall be thus paid, the United States agree to pay to said Indians, in such manner and for such purposes as the Secretary of the Interior may direct, interest at the rate of five per cent per annum from the date of the ratification of this treaty.

ARTICLE VI. Inasmuch as there are no agency buildings upon the new Seminole reservation, it is

therefore further agreed that the United States shall cause to be constructed, at an expense not exceeding ten thousand (\$10,000) dollars, suitable agency buildings, the site whereof shall be selected by the agent of said tribe, under the direction of the superintendent of Indian affairs; in consideration whereof, the Seminole nation hereby relinquish and cede forever to the United States one section of their lands, upon which said agency buildings shall be *directed* [erected], which land shall revert to said nation when no longer used by the United States, upon said nation paying a fair value for said buildings at the time vacated.

* * * * *

ARTICLE VIII. The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six.

ARTICLE IX. The United States reaffirms and reassumes all obligations of treaty stipulations en-

tered into before the treaty of said Seminole nation with the so-called confederate states, August first, eighteen hundred and sixty-one, not inconsistent herewith; and further agree to renew all payments of annuities accruing by force of said treaty stipulations, from and after the close of the present fiscal year, June thirtieth, in the year of our Lord one thousand eight hundred and sixty-six, except as is provided in article eight (viii).

ACT OF MARCH 3, 1873, C. 322, 17 STAT. 628

To authorize the Secretary of the Interior to negotiate with the Creek Indians for the Cession of a Portion of their Reservation, occupied by friendly Indians

Whereas by the third article of the treaty concluded with the Creek Indians June fourteenth, eighteen hundred and sixty-six, said Indians ceded to the United States, for the settlement of friendly Indians and freedmen, the west half of their entire domain, to be divided by a line running north and south; and whereas the recent survey of said line, made in conformity with the provisions of said treaty, includes within the limits of the Creek reservation, east of said line, some of the improvements made on a reservation selected on what was supposed to be the Creek ceded lands, for the Seminole tribe of Indians, which reservation is provided for in their treaty of March first, eighteen hundred and sixty-six, and also some of the improvements of the Sacs and Foxes, of the Mississippi tribe of Indians, made on a reservation intended to be established in accordance with the provisions of their treaty of February eighteenth, eighteen hundred and sixty-seven; and whereas said improvements have been made upon said lands

by and for the aforesaid Indians, who have settled thereupon in good faith, in accordance with treaty stipulations; and whereas it is necessary, in order to secure these improvements to said Indians, and to insure them suitable reservations, that the lands occupied thereby should be granted to them; Therefore,

Be it enacted by the Senate and House of Representatives, of the United States, of America, in Congress assembled: That the Secretary of the Interior be, and he hereby is, authorized to negotiate with the aforesaid Creek Indians for the relinquishment to the United States of such portions of their country as may have been set apart in accordance with treaty stipulations, for the use of the Seminoles, and the Sacs and Foxes of the Mississippi tribes of Indians, respectively, found to be east of the line separating the Creek ceded lands from the Creek reservation, and also to negotiate and arrange with said tribes for a final and permanent adjustment of their reservations; and the Secretary shall report the result to Congress.

ACT OF APRIL 15, 1854, C. 97, 18 STAT. 29

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hun-

dred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said treaty: *Provided*, That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe: *And provided further*, That the consent of said tribe to such expenditures and payment shall be first obtained.

PERTINENT PROVISION OF THE APPROPRIATION ACT OF
AUGUST 5, 1882, C. 390, 22 STAT. 265

To pay the Creek Nation of Indians for one hundred and seventy-five thousand acres of land now occupied by the Seminole Nation, the sum of one hundred and seventy-five thousand dollars, as per agreement made in pursuance of the act of March third, eighteen hundred and seventy-three, which agreement bears date February fourteenth, eighteen hundred and eighty-one, and is now on file in the Department of the Interior; said sum to be immediately available.

ACT OF MARCH 2, 1889, C. 412, 25 STAT. 980, 1004

SEC. 12. That the sum of one million nine hundred and twelve thousand nine hundred and forty-two dollars and two cents be, and the same hereby

is, appropriated, out of any money in the Treasury not otherwise appropriated, to pay in full the Seminole Nation of Indians for all the right, title, interest, and claim which said nation of Indians may have in and to certain lands ceded by article three of the treaty between the United States and said nation of Indians, which was concluded June fourteenth, eighteen hundred and sixty-six, and proclaimed August ~~sixteenth~~, eighteen hundred and sixty-six, and which land was then estimated to contain two million one hundred and sixty-nine thousand and eighty acres, but which is now, after survey, ascertained to contain two million thirty-seven thousand four hundred and fourteen and sixty-two hundredths acres, said sum of money to be paid as follows: One million five hundred thousand dollars to remain in the Treasury of the United States, to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semi-annually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available; this appropriation to become operative upon the execution by the duly appointed delegates of said nation, specially empowered so to do, of a release and conveyance to the United States of all the right, title, interest, and claim of said nation of Indians in and to said lands, in manner and

form satisfactory to the President of the United States, and said release and conveyance, when fully executed and delivered, shall operate to extinguish all claims of every kind and character of said Seminole Nation of Indians in and to the tract of country to which said release and conveyance shall apply, but such release conveyance, and extinguishment shall not inure to the benefit of or cause to vest in any railroad company any right, title, or interest whatever in or to any of said lands, and all laws and parts of laws so far as they conflict with the foregoing, are hereby repealed, and all grants or pretended grants of said lands or any interest or right therein now existing in or on behalf of any railroad company, except rights-of-way and depot grounds, are hereby declared to be forever forfeited for breach of condition.

ACT OF JULY 31, 1894, 28 STAT. 162, 208

Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

ACT OF JUNE 7, 1897, 30 STAT. 62, 84

That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified immediately upon their passage to the President of the United

States and shall not take effect if disapproved by him or until thirty days after their passage: *Provided*, That this Act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes.

ACT OF JUNE 28, 1898, C. 517, 30 STAT. 495, 502

SEC. 19. That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

ACT OF JULY 1, 1898, C. 542, 30 STAT. 567, RATIFYING
THE SEMINOLE AGREEMENT OF DECEMBER 16, 1897

Whereas an agreement was made by Henry L. Dawes, Tams Bixby, Frank C. Armstrong, Archibald S. McKennon, Thomas B. Needles, the Commission of the United States to the Five Civilized Tribes, and Allison L. Aylesworth, secretary, John F. Brown, Okchan Harjo, William Cully, K. N. Kinkehee, Thomas West, Thomas Factor, Seminole Commission, A. J. Brown, secretary, on the part of the Seminole Nation of Indians on December sixteenth, eighteen hundred and ninety-seven, as follows:

AGREEMENT BETWEEN THE UNITED STATES COMMISSIONERS TO
NEGOTIATE WITH THE FIVE CIVILIZED TRIBES, AND THE COM-
MISSIONERS ON THE PART OF THE SEMINOLE NATION

This agreement by and between the Government of the United States of the first part, entered into in its behalf by the Commission to the Five Civilized Tribes, Henry L. Dawes, Tams Bixby, Frank C. Armstrong, Archibald S. McKennon, and Thomas B. Needles, duly appointed and authorized thereunto, and the Government of the Seminole Nation in Indian Territory, of the second part, entered into on behalf of said Government by its Commission, duly appointed and authorized thereunto, viz, John F. Brown, Okchan Harjo, William Cully, K. N. Kinkehee, Thomas West and Thomas Factor;

Witnesseth, That in consideration of the mutual undertakings herein contained, it is agreed as follows:

All lands belonging to the Seminole tribe of Indians shall be divided into three classes, designated as first, second, and third class; the first class to be appraised at five dollars, the second class at two dollars and fifty cents, and the third class at one dollar and twenty-five cents per acre, and the same shall be divided among the members of the tribe so that each shall have an equal share thereof in value, so far as may be, the location and fertility of the soil considered; giving to each the right to select his allotment so as to include any improvements thereon, owned by him at the time; and each allottee shall have the sole right of occupancy of the land so allotted to him, during the existence of the present tribal government, and until the members of said tribe shall have become

citizens of the United States. Such allotments shall be made under the direction and supervision of the Commission to the Five Civilized Tribes in connection with a representative appointed by the tribal government; and the chairman of said Commission shall execute and deliver to each allottee a certificate describing therein the land allotted to him.

All contracts for sale, disposition, or encumbrance of any part of any allotment made prior to date of patent shall be void.

Any allottee may lease his allotment for any period not exceeding six years, the contract therefor to be executed in triplicate upon printed blanks provided by the tribal government, and before the same shall become effective it shall be approved by the principal chief and a copy filed in the office of the clerk of the United States court at Wewoka.

No lease of any coal, mineral, coal oil, or natural gas within said Nation shall be valid unless made with the tribal government, by and with the consent of the allottee and approved by the Secretary of the Interior.

Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury until extinguishment of tribal government, and the latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, upon extinguishment of tribal government, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

The townsite of Wewoka shall be controlled and disposed of according to the provisions of an act of the General Council of the Seminole Nation, approved April 23d, 1897, relative thereto; and on extinguishment of the tribal government, deeds of conveyance shall issue to owners of lots as herein provided for allottees; and all lots remaining unsold at that time may be sold in such manner as may be prescribed by the Secretary of the Interior.

Five hundred thousand dollars (\$500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; and there shall be selected and excepted from allotment three hundred and twenty acres of land for each of said academies and eighty acres each for eight district schools in the Seminole country.

There shall also be excepted from allotment one-half acre for the use and occupancy of each of twenty-four churches, including those already existing and such others as may hereafter be established in the Seminole country, by and with consent of the General Council of the Nation; but should any part of same, at any time, cease to be used for church purposes, such part shall at once revert to the Seminole people and be added to the lands set apart for the use of said district schools.

One acre in each township shall be excepted from allotment and the same may be purchased by the United States upon which to establish schools for the education of children of noncitizens when deemed expedient.

When the tribal government shall cease to exist the principal chief last elected by said tribe shall execute, under his hand and the seal of the Nation, and deliver to each allottee a deed conveying to him all the right, title, and interest of the said Nation and the members thereof in and to the lands so allotted to him, and the Secretary of the Interior shall approve such deed, and the same shall thereupon operate as relinquishment of the right, title, and interest of the United States in and to the land embraced in said conveyance, and as a guarantee by the United States of the title of said lands to the allottee; and the acceptance of such deed by the allottee shall be a relinquishment of his title to and interest in all other lands belonging to the tribe, except such as may have been excepted from allotment and held in common for other purposes. Each allottee shall designate one tract of forty acres, which shall, by the terms of the deed, be made inalienable and nontaxable as a homestead in perpetuity.

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided and reserving said sum of five hundred thousand dollars for school fund shall be paid per capita to the members of said tribe in three equal installments, the first to be made as soon as convenient after allotment and extinguishment of tribal government, and the others at one

and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

The loyal Seminole claim shall be submitted to the United States Senate, which shall make final determination of same, and, if sustained, shall provide for payment thereof within two years from date hereof.

There shall hereafter be held at the town of Wewoka, the present capital of the Seminole Nation, regular terms of the United States court as at other points in the judicial district of which the Seminole Nation is a part.

The United States agrees to maintain strict laws in the Seminole country against the introduction, sale, barter, or giving away of intoxicants of any kind or quality.

This agreement shall in no wise affect the provisions of existing treaties between the Seminole Nation and the United States, except in so far as it is inconsistent therewith.

The United States courts now existing, or that may hereafter be created, in Indian Territory shall have exclusive jurisdiction of all controversies growing out of the title, ownership, occupation, or use of real estate owned by the Seminoles, and to try all persons charged with homicide, embezzlement, bribery, and embracery hereafter committed in the Seminole country, without reference to race or citizenship of the persons charged with such crime; and any citizen or officer of said nation

charged with any such crime, if convicted, shall be punished as if he were a citizen or officer of the United States, and the courts of said nation shall retain all the jurisdiction which they now have, except as herein transferred to the courts of the United States.

When this agreement is ratified by the Seminole Nation and the United States the same shall serve to repeal all the provisions of the Act of Congress approved June seventh, eighteen hundred and ninety-seven, in any manner affecting the proceedings of the general council of the Seminole Nation.

It being known that the Seminole Reservation is insufficient for allotments for the use of the Seminole people, upon which they, as citizens, holding in severalty, may reasonably and adequately maintain their families, the United States will make effort to purchase from the Creek Nation, at one dollar and twenty-five cents per acre, two hundred thousand acres of land, immediately adjoining the eastern boundary of the Seminole Reservation and lying between the North Fork and South Fork of the Canadian River, in trust for and to be conveyed by proper patent by the United States to the Seminole Indians, upon said sum of one dollar and twenty-five cents per acre being reimbursed to the United States by said Seminole Indians; the same to be allotted as herein provided for lands now owned by the Seminoles.

This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation.

In witness whereof the said Commissioners have hereunto affixed their names at Muskogee, Indian

Territory, this sixteenth day of December, A. D.
1897:

HENRY L. DAWES,
TAMS BIXBY,
FRANK C. ARMSTRONG,
ARCHIBALD S. MCKENNON,
THOMAS B. NEEDLES,

Commission to the Five Civilized Tribes.

ALLISON I. AYLESWORTH,

Secretary.

JOHN F. BROWN,
OKCHAN HARJO,
WILLIAM CULLY,
K. N. KINKEHEE,
THOMAS WEST,
THOMAS FACTOR,

Seminole Commission.

A. J. BROWN,

Secretary.

Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the same be, and is hereby, ratified and confirmed, and all laws and parts of laws inconsistent therewith are hereby repealed.

Approved, July 1, 1898.

ACT OF MARCH 3, 1903, C. 934, 32 STAT. 982, 1008.

SEC. 8. That the tribal government of the Seminole Nation shall not continue longer than March fourth, nineteen hundred and six: *Provided*, That the Secretary of the Interior shall at the proper time furnish the principal chief with blank deeds necessary for all conveyances mentioned in the agreement with the Seminole Nation contained in

the Act of July first, eighteen hundred and ninety-eight (Thirtieth Statutes, page five hundred and sixty-seven), and said principal chief shall execute and deliver said deeds to the Indian allottees as required by said Act, and the deeds for allotment, when duly executed and approved, shall be recorded in the office of the Dawes Commission prior to delivery and without expense to the allottee until further legislation by Congress, and such records shall have like effect as other public records: *Provided further*, That the homestead referred to in said Act shall be inalienable during the lifetime of the allottee, not exceeding twenty-one years from the date of the deed for the allotment. A separate deed shall be issued for said homestead, and during the time the same is held by the allottee it shall not be liable for any debt contracted by the owner thereof.

RESOLUTION OF MARCH 2, 1906, 34 STAT. 822

[No. 7.] Joint Resolution Extending the tribal existence and government of the Five Civilized Tribes of Indians in the Indian Territory.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the * * * tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations of Indians in the Indian Territory are hereby continued in full force and effect for all purposes under existing laws until all property of such tribes, or the proceeds thereof, shall be distributed among the individual members of said tribes unless hereafter otherwise provided by law.

ACT OF APRIL 26, 1906; C. 1876, 34 STAT. 137, 141, 148

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided*, That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

Upon dissolution of the tribal governments, every officer, member, or representative of said

tribes, respectively, having in his possession, custody, or control any money or other property of any tribe shall make full and true account and report thereof to the Secretary of the Interior, and shall pay all money of the tribe in his possession, custody, or control, and shall deliver all other tribal property so held by him, to the Secretary of the Interior, and if any person shall willfully and fraudulently fail to account for all such money and property so held by him, or to pay and deliver the same as herein provided for sixty days from dissolution of the tribal government, he shall be deemed guilty of embezzlement and upon conviction thereof shall be punished by a fine of not exceeding five thousand dollars or by imprisonment, not exceeding five years, or by both such fine and imprisonment, according to the laws of the United States relating to such offense, and shall be liable in civil proceedings to be prosecuted in behalf of and in the name of the tribe for the amount or value of the money or property so withheld.

* * * * *

SEC. 28. That the tribal existence and present tribal governments of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes or nations are hereby continued in full force and effect for all purposes authorized by law, until otherwise provided by law, but the tribal council or legislature in any of said tribes or nations shall not be in session for a longer period than thirty days in any one year: *Provided*, That no act, ordinance, or resolution (except resolutions of adjournment) of the tribal council or legislature of any of said tribes or nations shall be of any validity until approved by the President of the United States: *Provided*

further, That no contract involving the payment or expenditure of any money or affecting any property belonging to any of said tribes or nations made by them or any of them or by any officer thereof, shall be of any validity until approved by the President of the United States.

ACT OF AUGUST 12, 1935, C. 508, 49 STAT. 571, 596

SEC. 2. In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band; and in all cases now pending or hereafter filed in the Court of Claims in which an Indian tribe or band is party plaintiff, wherein the duty of the court is merely to report its findings of fact and conclusions to Congress, the said Court of Claims is hereby directed to include in its report a statement of the amount of money which has been expended by the United States gratuitously for the benefit of the said tribe or band: *Provided*, That expenditures made prior to the date of the law, treaty, agreement, or Executive order under which the claims arise shall not be offset against the claims or claim asserted; and expenditures under the Act of June 18, 1934 (48 Stat. L. 984), except expenditures under appropriations made pursuant to section 5 of such Act, shall not be charged as offsets against any claim on behalf of an Indian tribe or tribes now pending in the Court of Claims or hereafter filed: *Provided fur-*

ther, That funds appropriated and expended from tribal funds shall not be construed as gratuities; and this section shall not be deemed to amend or affect the various Acts granting jurisdiction to the Court of Claims to hear and determine the claims listed on page 678 of the hearings before the subcommittee of the House Committee on Appropriations on the second deficiency appropriation bill for the fiscal year 1935: *And provided further*, That no expenditure under any emergency appropriation or allotment made subsequently to March 4, 1933, and generally applicable throughout the United States for relief in stricken agricultural areas, relief from distress caused by unemployment and conditions resulting therefrom, the prosecution of public works and public projects for the relief of unemployment or to increase employment, and for work relief (including the civil-works program) shall be considered in connection with the operation of this section.

PART II. MISCELLANEOUS

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, July 12, 1898.

The SECRETARY OF THE INTERIOR.

SIR: By your communication of July 9, 1898, I am asked for an opinion whether section 19 of an act of Congress approved June 28, 1898 (Public No. 162), entitled "An act for the protection of the people of the Indian Territory, and for other purposes," applies to the Seminole Nation of Indians.

Said section is as follows:

That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.

It is submitted that until the passage of this act it had been the practice of this Department, under the laws and regulations then in force, to deposit "such funds" in bulk with the Assistant Treasurer of the United States, at St. Louis, to the credit of the treasurers of "these tribes," to

be disbursed by them in their own way, under the laws of their respective nations.

By the expression "such funds" and "these tribes," used in your communication, I take it is meant moneys due any of the five civilized tribes from the United States government. The practice of this Department, therefore, has been to deposit any moneys, subject to disbursement on account of these tribes, with the Assistant Treasurer, at St. Louis, to the credit of the treasurers thereof, to be disbursed by them without the further supervision of the government.

Section one of the act, *supra*, provides that the word "officer," where the same appears in the criminal laws theretofore extended over and put in force in the Indian Territory, shall include all officers "of the several tribes or nations of Indians in said Territory."

Section 2 authorizes and requires the Judge of a United States Court of any district in said Territory to make "any tribe" of Indians a party to any suit pending in his court where it appears that the property of such tribe is in any way affected by the issues being heard.

Section 3 confers jurisdiction on the United States district courts in said Territory to try cases against persons who claim to hold lands and tenements as members of a tribe, and whose membership is denied by the tribe, and provides that "if it be found upon trial that the same are held unlawfully against the tribe by those claiming to be members thereof, and the membership and right are disallowed by the commission to the *Five Tribes*, or the United States court * * * then said court shall cause the parties charged with un-

lawfully holding said possessions to be removed from the same and cause the lands and tenements to be restored to the person or persons or nation or tribe of Indians entitled to the possession of the same."

Section 4 provides, "That all persons who have heretofore made improvements on lands belonging to any one of the said tribes of Indians" may under certain conditions sell and dispose of the same.

Section 11 provides for the allotment of lands when the roll of citizenship of "any one of said nations or tribes" is fully completed.

Section 15 provides, "That there shall be a commission in each town for each one of the Chickasaw, Choctaw, Creek, and Cherokee tribes," who shall cause to be surveyed and laid out townsites.

Section 16 makes it unlawful for any person to claim, demand or receive any royalty or rents on any lands or property belonging to "any one of said tribes or nations in said Territory."

Section 17 provides that it shall be unlawful for "any citizen of any one of said tribes" to hold possession of more than his approximate share of the allotted lands.

It is apparent from these excerpts from the act that section 19 prohibits the payment by the United States of moneys on any account whatever to officers or tribal governments of *any* of the five civilized tribes.

The Seminole Indians, as such, are nowhere mentioned in the act, but these Indians constitute one of the five civilized tribes, and are within the inhibition of said section, unless, as to them, it has been repealed by subsequent legislation.

An act approved July 1, 1898 (Public, No. 172), ratified the agreement of December 16, 1897, between the Dawes Commission and the Seminole Nation of Indians. One of the stipulations of that agreement was, that—

All moneys belonging to the Seminoles remaining after equalizing the value of allotments as herein provided, and reserving said sum of five hundred thousand dollars for school fund, shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient, after allotment and extinguishment of the tribal government. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.

The act *supra*, which ratifies and confirms this agreement, repeals "all laws and parts of laws inconsistent therewith."

There is nothing in the language quoted inconsistent with the provisions of section 19 of the act of June 28, 1898, *supra*. Indeed, these provisions in the two acts are substantially the same. The provision in the Seminole act that "all moneys belonging to the Seminole Indians * * * shall be paid *per capita* to the members of said tribe," the first payment to be made after the "extinguishment of tribal government" "by a person appointed by the Secretary of the Interior," is the substantial equivalent of the language used in the general act that payments shall not be made "to any of the tribal governments or any officer thereof," but

shall be made per capita direct to each individual, "under direction of the Secretary of the Interior by an officer appointed by him."

I have therefore to advise that section 19 of the act of June 28, 1898, applies to the Seminole Nation of Indians. Moreover, it results from what has been hereinbefore said that whether that act applies or not, the manner of disbursement under the Seminole act must be the same.

Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

DEPARTMENT OF THE INTERIOR,

July 12, 1898.

APPROVED:

THOS. RYAN,
Acting Secretary.

LETTER FROM ASSISTANT ATTORNEY GENERAL VAN
DEVANTER TO THE SECRETARY OF THE INTERIOR

DEPARTMENT OF THE INTERIOR,
OFFICE OF THE ASSISTANT ATTORNEY GENERAL,
Washington, August 15, 1898.

THE SECRETARY OF THE INTERIOR.

SIR: Under your reference of the 9th instant I have carefully considered the motion of the Seminole nation of Indians for a reconsideration of an opinion, dated the 12th ult., prepared in my office, upon the question whether section 19 of the act of June 28, 1898 (Public No. 162), entitled "An Act for the protection of the people of the Indian Territory and for other purposes," applies to the Seminole nation of Indians.

The matter involved in this reference and in your original request for an opinion, is of very difficult

solution and requires a careful examination of the Seminole treaties and of the legislation by Congress relating to that tribe. The real question intended to be presented is not simply whether section 19 of the act of June 28, 1898, applies to the Seminole tribe, but also whether that section is limited in its application to payments to members or per capita payments, or whether it includes and is applicable to the payment of the expenses of maintaining and conducting the tribal government.

The act of July 31, 1894 (28 Stat., 162, 208), provides:

Disbursing officers, or the head of any Executive Department, or other establishment not under any of the Executive Departments, may apply for and the Comptroller of the Treasury shall render his decision upon any question involving a payment to be made by them or under them, which decision, when rendered, shall govern the Auditor and the Comptroller of the Treasury in passing upon the account containing said disbursement.

The Comptroller of the Treasury seems to be the final arbiter of questions of the character here involved. An opinion by me upon the question presented would not be conclusive, and since the statute provides the means of obtaining an authoritative decision from the Comptroller of the Treasury, I respectfully suggest that my opinion of the 12th ultimo be withdrawn and that the matter be presented to the Comptroller of the Treasury for his decision.

I have personally prepared, and herewith submit for your consideration, a form of letter to the

Comptroller which, it is believed, presents the real question involved and all matters necessary to its proper solution.

• Very respectfully,

WILLIS VAN DEVANTER,
Assistant Attorney General.

DEPARTMENT OF THE INTERIOR.

August 16, 1898.

Approved:

C. N. BLISS,
Secretary.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
Washington, D. C., August 23, 1898.

The Honorable,

The SECRETARY OF THE INTERIOR.

(Aug. 16, 1898)

SIR: I have received your letter, without date, as follows:

The Indian appropriation act approved July 1, 1898 (Public, No. 175), makes the following appropriations for the Seminole tribe or nation of Indians:

“For five per centum interest on two hundred and fifty thousand dollars, to be paid as annuity, per *eighth* article of treaty of August seventh, eighteen hundred and *fifty-six*, twelve thousand five hundred dollars;

“For five per centum interest on two hundred and fifty thousand dollars, to be paid as annuity (they having joined their brethren West) per *eighth* article of treaty of August seventh, eighteen hundred and *fifty-six*, twelve thousand five hundred dollars;

“For interest on fifty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of schools, as per *third* article of treaty of March twenty-first, eighteen hundred and *sixty-six*, two thousand five hundred dollars;

“For interest on twenty thousand dollars, at the rate of five per centum per annum, to be paid annually for the support of the Seminole government, as per *same article same treaty*, one thousand dollars; in all, twenty-eight thousand five hundred dollars.”

“The treaty of August 7, 1856, with the Creeks and Seminoles (11 Stat. 699), secured to the said tribes respectively the right of self-government and contained the following stipulations in that connection:

“ARTICLE IV. The United States do hereby solemnly agree and bind themselves, that no State or Territory shall ever pass laws for the government of the Creek or Seminole Tribe of Indians, and that no portion of either of the tracts of country defined in the first and second articles of this agreement shall ever be embraced or included within, or annexed to, any Territory or State, nor shall either, or any part of either, ever be erected into a Territory without the full and free consent of the legislative authority of the tribe owning the same.

“ARTICLE XV. So far as may be compatible with the constitution of the United States, and the laws made in pursuance thereof, regulating trade and intercourse with the Indian tribes, the Creeks and Seminoles shall be secured in the unrestricted right of self-government, and full jurisdiction over persons and property, within their

respective limits; excepting, however, all white persons, with their property, who are not, by adoption or otherwise, members of either the Creek or Seminole tribe; * * *

"The first two items of appropriation hereinbefore mentioned are in fulfillment of that part of Article VIII, of this treaty, wherein the United States agrees and stipulate with the Seminoles—

"* * * * Also to invest for them the sum of two hundred and fifty thousand dollars, at five per cent. per annum, the interest to be regularly paid over to them *per capita* as annuity; the further sum of two hundred and fifty thousand dollars shall be invested in like manner whenever the Seminoles now remaining in Florida shall have emigrated and joined their brethren in the west, whereupon the two sums so invested shall constitute a fund belonging to the United tribe of Seminoles, and the interest on which, at the rate aforesaid, shall be annually paid over to them *per capita* as an annuity; * * *"

"The Seminole treaty of March 21, 1866 (14 Stat. 757), contains the following provision respecting the continuation of the tribal government:

"ARTICLE VII. The Seminole nation agrees to such legislation as Congress and the President may deem necessary for the better administration of the rights of person and property within the Indian Territory; *Provided, however,* That said legislation shall not in any manner interfere with or annul their present tribal organization, rights, laws, privileges, and customs."

"The last two items of appropriation hereinbefore mentioned are in fulfillment of that part of the third article of the treaty of March 21, 1866, wherein the United States

agreed to pay to the Seminoles the further sum of—

“ * * * seventy thousand dollars, to remain in the United States treasury, upon which the United States shall pay an annual interest of five percent; fifty thousand of said sum of seventy thousand dollars shall be a permanent school fund, the interest of which shall be paid annually and appropriated to the support of schools; the remainder of the seventy thousand dollars, being twenty thousand dollars, shall remain a permanent fund, the interest of which shall be paid annually for the support of the Seminole government; * * * ”

“ ‘As affecting the first two items of appropriation hereinbefore mentioned the act of Congress of April 15, 1874 (18 Stat. 29), provides:

“ ‘That the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, in distributing and paying annuities, interest, or other moneys now due or hereafter to become due to the Seminole tribe of Indians under the provisions of the eighth article of the treaty between the Creek and Seminole Indians and the United States, concluded August seventh, eighteen hundred and fifty-six, shall be authorized to expend the same for such objects as will best promote the comfort, civilization, and improvement of the Seminole Indians, or in his discretion, with the sanction of the Secretary and the President aforesaid, shall be authorized to pay such annuities or any part thereof into the treasury of the Seminole nation to be used as the council of the same shall provide, instead of paying the same per capita according to the terms of said

treaty; *Provided*, That said agreement shall provide that the sum of five thousand dollars shall be annually appropriated out of said annuity to the school fund of said tribe; *And provided further*, That the consent of said tribe to such expenditures and payment shall be first obtained.'

"By the act of the Seminole legislature (also called council) of April 2, 1879, the tribe consented that all annuities then due or thereafter to become due to it under the provisions of the 8th article of the said treaty of August 7, 1856, should be paid into the Treasury of the Seminole nation to be used as the council of the same should provide, instead of being paid per capita according to the terms of said treaty, and by said Seminole act it was further provided that the sum of \$5,000, should be annually appropriated out of said annuity to the school fund of said tribe. In pursuance of said act of Congress of April 15, 1874, and of the consent of the tribe so given by the act of its legislature, the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President of the United States, has since April 2, 1879, regularly paid into the treasury of the Seminole nation, to be used as the council of the same should provide, the annuities due to said tribe under the provisions of the 8th article of the said treaty of August 7, 1856, and the sum of \$5,000 has annually been appropriated by the said tribe out of said annuity to the school fund of said tribe.

"Following the said act of Congress of April 15, 1874, and the Seminole act of April 2, 1879, the Commissioner of Indian Affairs in his discretion, with the sanction of the Secretary of the Interior and the President

of the United States, now desires to pay into the treasury of the Seminole nation as heretofore the annuities named in the first two items of appropriation hereinbefore mentioned, to be used as the council of the same shall provide, if section 19 of the act of Congress of June 28, 1898 (Public No. 162), entitled, 'An Act for the protection of the people of the Indian Territory and for other purposes,' does not prohibit the further payment of said annuities into the tribal treasury.

"Heretofore the money annually appropriated by Congress for the support of the Seminole schools and for the support of the Seminole government, respectively, in fulfillment of the 3d article of the treaty of March 21, 1866, has been paid under the direction of the Secretary of the Interior to the treasurer of said tribe, to be applied to said purposes and expended according to the laws of the tribe, and it is now desired by the Commissioner of Indian Affairs and the Secretary of the Interior that the moneys embraced in the last two items of appropriation hereinbefore mentioned shall now be paid as heretofore to the treasurer of said tribe to be applied to said purposes and expended according to the laws of the tribe, if section 19 of the act of Congress of June 28, 1898, *supra*, does not prohibit the further payment of said moneys to the tribal treasurer.

"By act of Congress of March 2, 1889 (25 Stat. 980, 1004), certain moneys were appropriated to pay the Seminoles for the release and conveyance of certain lands, which moneys were to be paid as follows:

" * * * One million five hundred thousand dollars to remain in the Treasury

of the United States to the credit of said nation of Indians and to bear interest at the rate of five per centum per annum from July first, eighteen hundred and eighty-nine, said interest to be paid semiannually to the treasurer of said nation, and the sum of four hundred and twelve thousand nine hundred and forty-two dollars and twenty cents, to be paid to such person or persons as shall be duly authorized by the laws of said nation to receive the same, at such times and in such sums as shall be directed and required by the legislative authority of said nation, to be immediately available: * * *

"Upon the execution and delivery of the required release and conveyance, the said sum of \$412,942.20 was paid to the treasurer of the tribe, he being authorized by a law of the nation to receive the same, and since then the semiannual interest on the said \$1,500,000 has been regularly paid "to the treasurer of said nation" to be used, applied and expended according to the laws of the tribe. An instalment of this interest fell due July 1, 1898, but this Department is not yet advised whether it has been paid to the tribal treasurer or is being withheld pending the consideration of the provisions of section 19 of the act of June 28, 1898, *supra*.

"The four items of appropriation for the Seminoles made by the Indian appropriation act of July 1, 1898, *supra*, and the annual interest on the \$1,500,000, under the act of March 2, 1889, *supra*, make the total annual income or revenue of the Seminoles from funds held by the United States \$103,500.00. Under the laws of that nation or tribe this income or revenue is appropriated, used, applied, and expended in the payment of the expenses of maintaining and

conducting the tribal government, including an executive office, a legislature (or council), courts, constabulary, public schools, charitable and penal institutions, public roads and bridges, etc.,—the annual appropriation for public schools being \$24,000.

“The act of Congress of June 28, 1898 (Public, No. 162), entitled ‘An Act for the protection of the people of the Indian Territory and for other purposes,’ chiefly relates to the affairs and government of the Five Civilized Tribes of Indians in said Territory, the Seminole tribe being one of them. Section 19 of this act provides:

“‘That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation.’

“This section as it passed the House of Representatives did not contain the words ‘by the United States’ following the words ‘hereafter be made’ in the first part of the section, but did contain the words ‘all expenses incurred in transacting their business and of’ following the words ‘but payments of’ near the middle of the section. In the course of the consideration of the measure in the Senate the section was amended by inserting the words ‘by the United States’ as above indicated, and by striking out the words ‘all expenses incurred in transacting their business and of,’ as above

indicated. A copy of the bill, H. R. 8581, as it passed the House of Representatives, with the Senate amendments shown therein, accompanied the letter of the Acting Secretary of the Interior of the 23d ultimo, requesting a ruling by you respecting the payment of certain appropriations made for the Creek Indians.

"By act of Congress of July 1, 1898 (Public No. 172), entitled 'An Act to ratify the agreement between the Dawes commission and the Seminole nation of Indians,' an agreement negotiated between the Seminoles and the Dawes commission, bearing date December 16, 1897, was ratified by Congress and all laws and parts of laws inconsistent therewith were thereby repealed. This agreement seems to recognize the existing tribal government of the Seminoles and to contemplate a continuance thereof for the time being, although it also seems to contemplate and to be intended to lead up to, an ultimate extinguishment of the tribal government. The effect of this agreement upon existing treaty stipulations is therein stated in these words:

"This agreement shall in nowise affect the provisions of existing treaties between the Seminole nation and the United States except in so far as it is inconsistent therewith."

"The only provisions in this agreement regulating the payment of money to the Seminole tribe, are contained in the three following stipulations therein:

"Should there be discovered on any allotment any coal, mineral, coal oil, or natural gas, and the same should be operated so as to produce royalty, one-half of such royalty shall be paid to such allottee and the remaining half into the tribal treasury *until extinguishment of tribal government*, and the

latter shall be used for the purpose of equalizing the value of allotments; and if the same be insufficient therefor, any other funds belonging to the tribe, *upon extinguishment of tribal government*, may be used for such purpose, so that each allotment may be made equal in value as aforesaid.

* * * * *

“Five hundred thousand dollars (\$500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest; or invested so as to produce such amount of interest, which shall be, *after extinguishment of tribal government*, applied by the Secretary of the Interior to the support of Mekasuky and Emahaka Academies and the district schools of the Seminole people; * * *

* * * * *

“All moneys belonging to the Seminoles *remaining after equalizing the value of allotments as herein provided*, and reserving said sum of five hundred thousand dollars for school funds shall be paid per capita to the members of said tribe in three equal instalments, the first to be made as soon as convenient *after allotment and extinguishment of tribal government*, and the others at one and two years, respectively. Such payments shall be made by a person appointed by the Secretary of the Interior, who shall prescribe the amount of and approve the bond to be given by such person; and strict account shall be given to the Secretary of the Interior for such disbursements.”

“A question has arisen whether the money due to the Seminole tribe under the Indian appropriation act of July 1, 1898, aforesaid, and the interest on the \$1,500,000 under the act of March 2, 1889, aforesaid, can all, or any of it, be now paid into the tribal treasury, as heretofore, or whether such money must be paid out and disbursed ‘under direction of the Secretary of the Interior by an officer appointed by him’ pursuant to section 19 of the act of June 28, 1898, aforesaid.

“The Seminole tribe insist that all of said money can be, and should be, paid as heretofore, into the tribal treasury, to be applied and expended according to the laws of the tribe. In this connection the tribe contends:

“First, That section 19 only prohibits the payment of money ‘to any of the tribal governments or to any officer thereof for *disbursement*,’ and that the word ‘disbursement,’ as here employed, means distribution in the sense of a division among the members and does not include the payment of expenses incurred in the course of maintaining and conducting the tribal government. It is claimed that this is shown (a) by the striking out of the words ‘all expenses incurred in transacting their business and of’ from the section as it passed the House of Representatives; (b) by the fact that otherwise construed the two parts of the section are not coextensive or harmonious, the first part of the section withholding all moneys of every kind from the tribal government and its officers, while the succeeding part of the section only regulates payments to members or per capita payments; in other words, that no provision is made for the payment of the expenses of

maintaining and conducting the tribal government to which the moneys are appropriated and applied under the tribal laws, the new and substituted provision for disbursement only applying to payments to members or per capita payments, while the expenses incurred in maintaining and conducting the tribal government are not incurred on the per capita plan and in many instances are to be paid to persons who are not members of the tribe, as in the case of payments to teachers in the public schools; (c) by the fact that contemporaneously with the adoption of section 19, and as a part of the same act (sections 29 and 30), agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks, were ratified, containing the following stipulations, respectively:

“That all per capita payments hereafter made to the *members* of the Choctaw or Chickasaw nations shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to said Secretary.”

“All payments hereafter to be made to the members of the said nation shall be paid directly to each individual member by a bonded officer of the United States, under the direction of the Secretary of the Interior, which officer shall be required to give strict account for such disbursements to the Secretary.”

and by the fact that the Seminole agreement ratified almost simultaneously (July 1, 1898), contains a similar provision (hereinbefore quoted), all being limited to a regulation of payments to members or per capita

payments—the claim advanced in this connection being that the provisions of these three agreements upon this subject are *in pari materia* with section 19 and all should be construed together, and that so construed section 19 does not include payments which are not otherwise directed by law to be made to members or per capita; (d) by the fact that the following provision of the act of June 7, 1897 (30 Stat. 62, 84):

“That on and after January first, eighteen hundred and ninety-eight, all acts, ordinances, and resolutions of the council of either of the aforesaid Five Tribes passed shall be certified, immediately upon their passage to the President of the United States and shall not take effect, if disapproved by him, or until thirty days after their passage; *Provided*, That this act shall not apply to resolutions for adjournment, or any acts, or resolutions, or ordinances in relation to negotiations with commissioners heretofore appointed to treat with said tribes.”

was entirely repealed as to the Seminoles by the terms of the agreement with that tribe ratified July 1, 1898, and was repealed as to tribal laws appropriating money for the regular and necessary expenses of the tribal government by the agreements with the Choctaws and Chickasaws and with the Muscogees or Creeks ratified by the act of June 28, 1898, thereby manifesting the intention of Congress to commit to these tribes the full control heretofore exercised over the expenses of maintaining and conducting the tribal governments.

“SECOND. That section 19 does not require that money payable in any other form or manner, be changed or converted into payments to members or per capita payments,

but only directs that such payments to members or per capita payments as are elsewhere and otherwise provided for by law, shall be made under the direction of the Secretary of the Interior, according to the provisions of that section. In this connection the tribe claims that by the action of the tribe and of the Commissioner of Indian Affairs, under the act of April 15, 1874, *supra*, the interest payments provided for by the eighth article of the treaty of August 7, 1856, which include the first two items of appropriation hereinbefore mentioned, were changed and converted from per capita payments into payments for school and other tribal purposes; that the payments of interest provided for by the third article of the treaty of March 21, 1866, which include the last two items of appropriation hereinbefore mentioned, and the payments of interest provided for by the act of March 2, 1889, *supra*, have never been directed to be made to members or per capita but were directed to be made otherwise; and that therefore the pending payments to the Seminole tribe, under the Indian appropriation act of July 1, 1898, and the act of March 2, 1889, do not any of them come within the provisions of section 19.

"THIRD. That if section 19, properly construed, applies to the payment of the expenses of maintaining and conducting the tribal governments it is repealed, as to the Seminole tribe, by the subsequent act of July 1, 1898, ratifying the new agreement with that tribe and repealing 'all laws and parts of laws inconsistent therewith,' because that agreement, as a whole and in every essential particular, shows that the intent and purpose of Congress and the Seminole tribe was to continue the existing tribal

government with all of its official machinery, until the affairs of the tribe are concluded and the tribe is ready to go out of existence.

"Because of the importance of the questions presented, and the necessity of having an authoritative decision thereof, I beg that under the provisions of the act of July 31, 1894 (28 Stat. 162, 208), you will decide whether the moneys appropriated for the Seminole tribe, by the Indian appropriation act of July 1, 1898, and the interest money provided for by the act of March 2, 1889, can now, as heretofore, be paid into the tribal treasury, or whether such moneys are now required to be paid or disbursed under the direction of the Secretary of the Interior by an officer appointed by him, pursuant to the provisions of section 19 of the act of June 28, 1898."

It seems unnecessary to enter into a critical analysis of the language of section 19 of the act of June 28, 1898 (Public No. 162); for reasons which will presently appear.

The agreement made between the Dawes Commission and the Seminole Indians, December 16, 1897, was ratified by Congress by the act of July 1, 1898, (Public No. 172). The enacting clause of this act provides:

"That the same be, and is hereby, ratified and confirmed, and all laws and parts of laws inconsistent therewith are hereby repealed."

If section 19 of the act of June 28, 1898, is inconsistent with the provisions of the agreement, which was ratified by the act of July 1, 1898, the former has been repealed so far as the Seminole Indians are concerned.

There is a clause in the agreement as follows:

"This agreement shall in nowise affect the provisions of existing treaties between the Seminole Indians and the United States, except in so far as it is inconsistent therewith."

From the foregoing it clearly appears that the rights and duties of the Seminole Indians are to be measured by the provisions of existing treaties construed in the light of and together with the agreement of December 16, 1897.

"This agreement shall be binding on the United States when ratified by Congress and on the Seminole people when ratified by the general council of the Seminole Nation."

The agreement has been ratified by both parties, and, therefore, it will control in the disposition of the question presented.

From the presentation of the case as it appears in your letter it seems to me clear that it was not the intention of the agreement, nor does that instrument in fact deprive the Seminole tribal government of its privilege and duty of disbursing its own funds *prior to the time of the extinguishment of its tribal government*, which extinguishment is evidently contemplated in the near future; therefore, I am of opinion that the moneys due these Indians can be turned over to the tribal authorities for disbursement until such time as the tribal government shall be extinguished.

Respectfully yours,

L. P. MITCHELL,
Assistant Comptroller.

J. D. T.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE TREASURY,
Washington, October 19, 1906.

The Honorable

The SECRETARY OF THE INTERIOR. .

SIR: I have received your letters of October 8 and 12, 1906 (I. T. D.) in reference to the method of disbursing moneys due the Seminole tribe of Indians. The questions upon which you ask my decision are the following:

1. Whether, under the provisions of sections 11 and 28 of the act of April 26, 1906 (34 Stat. 137), expenditures from the tribal funds and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation or under the direction of the Secretary of the Interior.

In the decision of this office, dated August 23, 1898 (7 MS. Dec. 350), it was held that section 19 of the act of June 28, 1898 (30 Stat. 502), requiring that no moneys on any account whatever should be paid to tribal authorities, but be paid out under the direction of the Secretary of the Interior, did not apply to the Seminoles. The reason for that holding was that the later act of July 1, 1898 (30 Stat. 567), ratifying and confirming an agreement with the Seminoles, expressly repealed all laws and parts of laws inconsistent with the later act. It was therefore further held that the act of June 28, 1898, *supra*, did not deprive the Seminole tribal government of its privilege and duty of disbursing its own funds prior to the extinguishment of its tribal government.

The act of April 26, 1906, *supra*, by section 28, specifically continues the tribal existence and present tribal governments of the Five Civilized Tribes and naming each of them.

Your first question can only be answered by considering whether section 11 of the act of 1906 does deprive the Seminole tribal government of its right to disburse its own funds while the tribal government continues, a right which the Controller held was preserved in the agreement between the United States and the Seminoles, ratified July 1, 1898.

Under treaties of August 7, 1856, and March 21, 1866, the Seminoles are entitled to appropriations of \$28,500 each year, being the interest at five per centum per annum on \$570,000. Such appropriations are made from year to year. By the act of March 2, 1889 (25 Stat. 1004), it was provided that \$1,500,000, a part of the price of lands purchased by the United States from the Seminoles, should remain in the Treasury and five per centum per annum thereon should be paid semiannually to the treasurer of the Seminole Nation. By the agreement which was ratified in the act of July 1, 1898 (30 Stat. 567), it was provided that:

"Five hundred thousand dollars (\$500,000) of the funds belonging to the Seminoles, now held by the United States, shall be set apart as a permanent school fund for the education of children of the members of said tribe, and shall be held by the United States at five percent interest, or invested so as to produce such amount of interest, which shall be, after extinguishment of tribal government, applied by the Secretary of the Interior to the support of Mekasuky and Ema-

haka Academies and the district schools of the Seminole people."

By the act of April 15, 1874 (18 Stat. 29), it was provided that the annual payment of \$25,000 under the treaty of 1856 might be paid into the treasury of the Seminole Nation to be used as the council of the Nation should provide, if the tribe consented thereto and agreed to appropriate \$5,000 annually for the school fund. This consent and agreement was given and made by the Seminoles.

An examination of the language in the first sentence in section 11 of the act of April 26, 1906, *supra*, makes it clear that the revenues accruing to the tribes, which revenues are to be collected by an officer appointed by the Secretary of the Interior, do not include the interest on moneys of the Seminole tribe in the Treasury of the United States. By treaty, law and agreement with the Seminoles such interest is required to be paid into the tribal treasury. Neither the act of 1906, nor earlier laws, make specific provision for the distribution of the interest money among the members of the tribe. There is, in my opinion, no authority in section 11 for the Secretary to make distribution of annuities arising from tribal funds to members of the Seminole tribe. Neither from the language of the section, nor by implication, can such authority be found. Nor is there authority in that section for the Secretary to apply such interest to the payment of any obligations except lawful claims against the tribe contracted after July 1, 1902, or for which warrants have been regularly issued. As to such claims and such warrants full authority is given to the Secretary of the Interior to use any fund in the United States

Treasury belonging to the tribe to make payment, and that authority continues as to claims contracted or warrants issued prior to dissolution of the tribal government.

In answer to your first question, I am of the opinion that expenditures from the tribal funds, and distribution of annuities arising therefrom to members of the Seminole tribe should be made by the tribal authorities of the Seminole Nation, subject, however, to the approval of the President so far as required by section 28 of the act; and except as the right and duty is devolved upon you to disburse so much of the funds as is necessary to carry out the requirements of section 11 as to payment of lawful claims and warrants, and to carry out the requirements of section 10 as to schools.

I return the letters and papers which you transmitted.

Respectfully,

R. J. TRACEWELL,

Controller.

J. D. T.

OPINION OF ATTORNEY GENERAL BONAPARTE DATED
AUGUST 19, 1907 (26 OP. A. G. 340)

DEPARTMENT OF JUSTICE,

Washington, August 19, 1907.

The SECRETARY OF THE INTERIOR;

SIR: In your letter of March 22, you submit certain questions raised by the Hon. John F. Brown, principal chief of the Seminole Nation, in regard to the constitutionality of the act of Congress of April 26, 1906 (34 Stat., 137), providing for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, in so far as it mod-

ifies or changes the provisions of the agreements in regard to the allotment, distribution and administration of the property and funds of the Seminole Nation which were negotiated with that nation by the Commission to the Five Civilized Tribes and ratified by the acts of Congress of July 1, 1898 (30 Stat., 567), and June 2, 1900 (31 Stat., 250). Certain other questions raised by Chief Brown as to the extent of your authority under said act are also presented. The several questions referred to are specifically stated by you as follows:

* * * * *

“5. As to the power of the Department to direct that all Seminole warrants issued after January 1, 1907, shall be approved by the United States Indian inspector for the Indian Territory, and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the Seminole Nation.”

* * * * *

The provision of section 10 in regard to the control of the tribal schools and the lands and property pertaining thereto by the Secretary of the Interior, and the use of the tribal funds for the purpose of defraying the necessary expenses of such schools, is likewise a purely governmental and administrative matter, and involves no taking of the property of the nation. In this connection it will be observed that the Secretary is authorized to use “only such portion of said funds of each tribe as may be requisite for the schools of that tribe, not exceeding in any one year for the respective tribes the amount expended for the scholastic year ending June thirtieth, nineteen hundred and five.”

The provision of section 11 as to the collection of the tribal revenues and the payment of claims against the tribes is also of the same character.

There remains to be considered only the question as to your authority "to direct that all Seminole warrants issued after January 1, 1907, shall be approved by the United States Indian inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the treasurer of the nation."

The answer to this question depends upon the extent of your authority over the financial affairs of the Seminole Nation, under the act of April 26, 1906. By section 11 of that act, all the revenues of whatever character accruing to the Seminole tribe, among others, whether before or after the dissolution of the tribal government, is directed to be collected by an officer appointed by you, and you are also directed to pay all lawful claims against the tribes mentioned which may have been contracted after July 1, 1902, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. In addition, as above noted, you are authorized to defray the expenses of the tribal schools out of the funds of said tribes in the treasury of the United States.

In my judgment, the purpose of Congress, in these sections, was to give you exclusive control, within the limitations stated, of the revenues of the Five Civilized Tribes, including the Seminole Nation. It certainly could not have been its purpose, after authorizing you to defray the expenses of the tribal schools, and to pay all lawful claims con-

tracted after July 1, 1902, or for which warrants had been regularly issued, to continue in the tribal government authority to make like or other disbursements, especially in view of the fact that it had turned the collection of all tribal revenues of whatever character over to an officer appointed by you. Being therefore empowered and directed to make all disbursements on behalf of the Seminole Nation that are now authorized, I have no doubt whatever that you may safeguard those disbursements by requiring that all Seminole warrants issued after January 1, 1907, shall be approved by the United States Indian inspector for the Indian Territory and paid by the United States Indian agent, Union Agency, instead of being paid by the Treasurer of the nation.

Respectfully,

CHARLES J. BONAPARTE,
Attorney General.

GENERAL ACCOUNTING OFFICE REPORT, PAGE 148

Disbursement Schedule No. 42

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation: "Fulfilling Treaties with Florida Indians, or Seminoles"

Treaty of August 7, 1832 11 Stat. 699	Fiscal year		
	1858	1859	1860
Article 8: Payment for improvements, and expenses of removal and establishment.....	\$90,000.00		
Per capita payments.....	12,500.00	\$12,500.00	\$25,000.00
Support of blacksmiths.....		407.82	1,391.16
Agricultural aid.....			278.00
Article 9:			
Removal and subsistence of Indians.....	32,500.00	2,010.75	37,436.21
Blankets.....		857.50	581.75
Powder and lead.....		228.07	1.00
Shoes.....		247.30	
Tobacco.....		164.00	9.60
Strouding.....			6.25
Rifles.....		807.70	
Agricultural implements and equipment.....		1,475.63	
Axes.....		508.00	36.00
Plows.....		618.75	
Seeds.....			176.00
Article 10:			
Expenses of delegations.....	9,315.98		6,215.00
Seminole Nation jointly with Creek Indians:			
Expenses of delegations.....	27,062.96		
Carried forward.....	171,378.94	19,914.85	71,131.06

For dates of appropriation acts, statute references, and amounts appropriated, see pages 326 and 327.

GENERAL ACCOUNTING OFFICE REPORT, PAGE 150

Disbursement Schedule No. 42—Continued.

Treaty of August 7, 1856, 11 Stat. 609	Fiscal year		
	1861	1863	1865
Article 8:			
Per capita payments	\$25,000.00		
Support of blacksmiths	1,188.00		
Article 9:			
Removal and subsistence of Indians	1,563.86		
Seeds	95.62		
Payment for improvements	18,210.00		
Article 21:			
Expenses of surveying	1,577.00	\$1,775.49	
Seminole Nation jointly with Creek Indians: Expenses of surveying		149.00	
Miscellaneous items:			
Expenses of transporting money for improvements	102.00		
Expenses of transporting annuity	119.00		
Traveling expenses of agent			\$230.50
Provisions			95.65
Clothing			573.00
Expenses of advertising sale of cattle			33.00
Seminole Nation jointly with Wichita Indians: Expenses of transporting goods for Seminole and Wichita Indians	1,304.37		
Total	\$49,154.28	\$1,924.49	\$932.15

GENERAL ACCOUNTING OFFICE REPORT, PAGE 151

Treaty of August 7, 1856, 11 Stat. 609	Fiscal year		
	1867	1868	1869
Article 8:			
Per capita payments	\$12,500.00	\$24,550.00	\$24,999.75
Support of blacksmiths	731.06	1,000.00	405.44
Agricultural aid	1,603.80	396.20	
Education		5,000.00	
Miscellaneous items: Pay and expenses of agent	449.53		
Total	\$15,284.39	\$28,946.20	\$25,405.19

GENERAL ACCOUNTING OFFICE REPORT, PAGE 308

ABSTRACT NO. 10

Abstract of disbursements made by the United States for the benefit of the Seminole Nation of Indians from moneys appropriated pursuant to and in connection with the Treaties of August 7, 1856, 11 Stat. 699, and March 21, 1866, 14 Stat. 755, during the period from July 1, 1907, to June 30, 1930.

Schedule No.	Name of appropriation or fund	Amount disbursed
57	Fulfilling Treaties with Florida Indians, or Seminoles.....	(*) \$71,250.00
58	Interest on Seminoles of Oklahoma Fund.....	(*) 204,780.00
59	Seminoles of Oklahoma Fund.....	(*) 570,050.00
	Total.....	(*) 846,080.00

(*) See page 24, Item (p).

(*) See page 307, Item (b).

(*) See page 306, Item (c).

(*) See page 305, Item (b); also page 5, Item (j).

GENERAL ACCOUNTING OFFICE REPORT, PAGE 309

DISBURSEMENT SCHEDULE NO. 57

Disbursements made by the United States for the benefit of the Seminole Nation of Indians under the appropriation:

*Fulfilling Treaties with Florida Indians, or Seminoles **

	Fiscal year		
	1908	1909	1910
Administrative expenses, Seminole National Government.....	\$42,747.00	\$11,002.96	
Per capita payments.....			\$15,200.00
Total.....	42,747.00	11,002.96	15,200.00

* For dates of appropriation acts, statute references, and amounts appropriated, see pages 326 to 329.

GENERAL ACCOUNTING OFFICE REPORT, PAGE 310

Disbursement Schedule No. 57—Continued

	Fiscal year		Total
	1919	1921	
Administrative expenses, Seminole National Government.....			\$53,749.96
Per capita payments.....	\$2,100.00	\$200.04	17,500.04
Total.....	2,100.00	200.04	71,250.00

BREAK-DOWN OF GRATUITY EXPENDITURES MADE ON BEHALF OF THE SEMINOLE TRIBE OF INDIANS FOR EDUCATIONAL PURPOSES AS SET FORTH IN FINDING 18

Purpose	Report G. A. O., page	Amount	Total
Aid of common schools.....	106	\$2,500.00	\$2,500.00
Board and tuition.....	28 29	3,375.97 7,612.43	10,888.42
Books, stationery, etc.....	88 92 105	217.27 .76 4,673.47	4,891.50
Clothing.....	106	11,182.77	11,182.77
Erection and care of school buildings.....	91 105 109 114	1,316.70 2,491.50 572.00 5.65	4,385.85
Feed and care of livestock.....	106 114	621.50 3.69	625.19
Fuel, light, and water.....	114	1.15	1.15
Furniture and equipment.....	10 88 91 106 109 114	204.86 598.60 125.00 2,235.76 1,930.24 27.75	5,121.61
Maintenance of Cherokee Orphan Training School.....	30 31 32 33	359,978.00 38,518.86 5,634.87 5,703.00	

BREAK-DOWN OF GRATUITY EXPENDITURES, ETC.—Continued

Purpose	Report G. A. O., page	Amount	Total
Maintenance of Cherokee Orphan Training School—Continued.	34	\$61,450.96	
	35	25,002.24	
	36	1,000.00	
	51	2.96	
	83	21,297.93	
	88	1,126,449.76	
	91	8,541.49	
	93	736.96	
	94	13,385.98	
	95	295.10	
	110	436.85	
	117	4,852.25	
	114	10.00	
	151	23,224.82	
	154	4.18	
Medical attention	105	2.60	\$1,603,325.90
	154	83.45	
Miscellaneous school expenses	105	63,589.87	86.03
	109	3,369.12	
	114	568.47	
Pay of miscellaneous school employees	28	1,763.31	67,527.46
	29	1,380.00	
	83	7,075.73	
	88	589.48	
	105	213,552.53	
	109	19,017.48	
	114	3,022.85	
Pay of superintendents and teachers	29	724.00	246,401.38
	83	1,645.34	
	105	106,857.82	
	109	16,092.00	
	114	306.61	
Provisions	105	1,231.70	125,625.77
School farm	114	15.64	1,231.70
Transportation, etc., of supplies	105	30.28	15.64
	109	3.58	
	114	500.41	
	151	4,239.05	
	168	650.79	
	175	5.62	
Traveling expenses	88	64.73	5,489.53
	92	213.21	277.94
		\$2,179,846.86	
			\$2,179,846.86

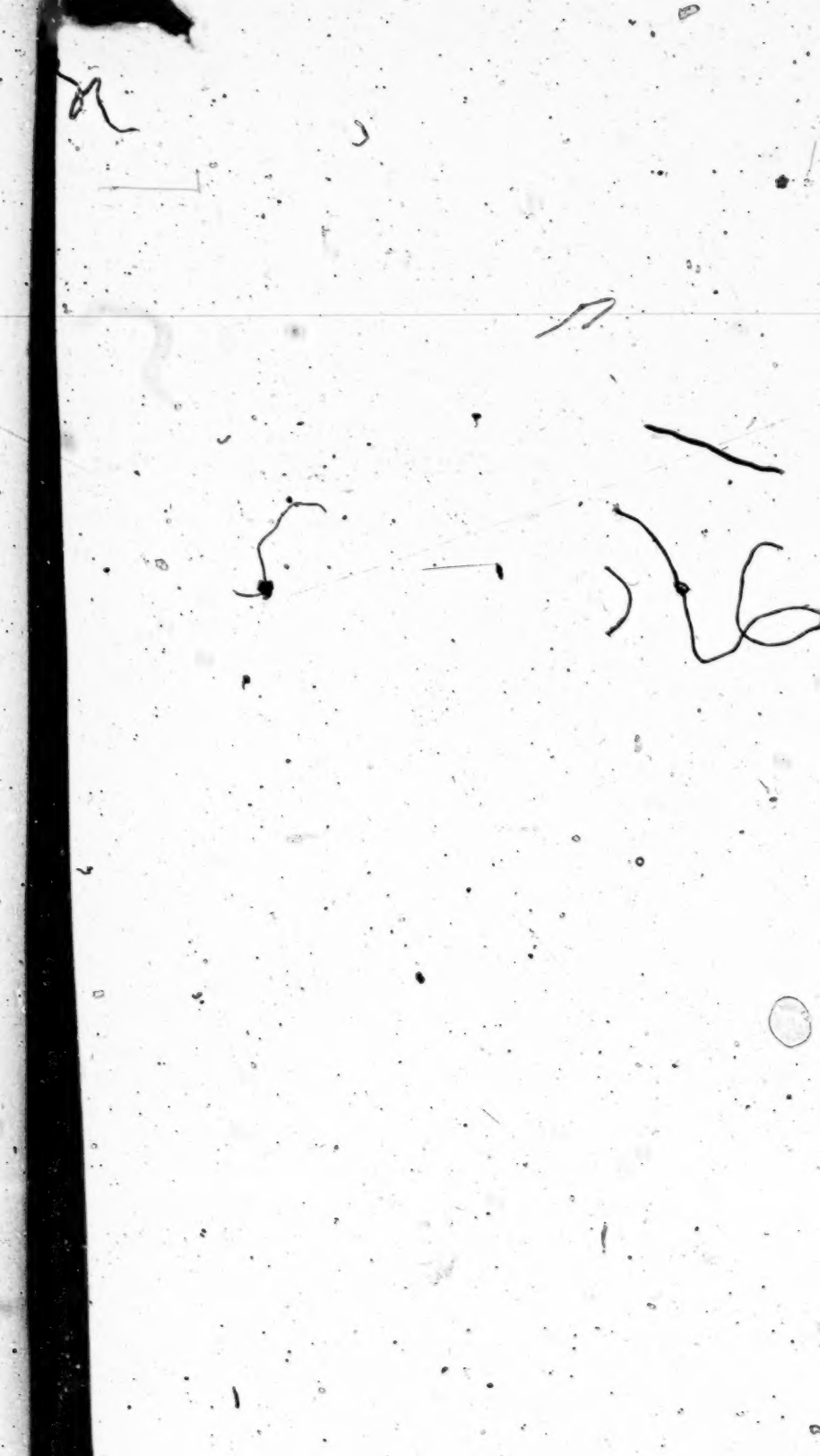
TABLE OF GENERAL AND LOCAL APPROPRIATIONS, BY
CLASSES AND PURPOSES—SCHMECKEBIER, OFFICE OF
INDIAN AFFAIRS. (THE BROOKINGS INSTITUTION,
1927), PP. 518-519

TABLE 3.—General and Local Appropriations, by Classes and Purposes

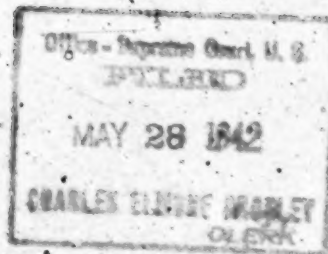
Classes and purposes	Fiscal years			
	1903	1913	1923	1928
GENERAL APPROPRIATIONS—GRATUITY				
Salaries, Bureau of Indian Affairs	\$140,520.00	\$231,710.00	\$306,130.00	\$350,000.00
Increase of compensation, Indian Service			1,061,200.00	
Classification of files		5,000.00		
Compilation of laws	3,000.00			
Inspectors	20,000.00		24,000.00	16,000.00
Traveling expenses of inspectors	12,800.00			
General expenses	45,000.00	125,000.00	115,000.00	
Expenses of Board of Indian Commissioners	4,000.00	4,000.00	9,500.00	11,000.00
Support of schools	1,240,000.00	1,420,000.00	1,675,000.00	2,429,700.00
Pay superintendent of schools	3,000.00			
Traveling expenses of superintendent of schools	1,500.00			
School transportation	44,000.00	82,000.00	85,000.00	90,000.00
School buildings	250,000.00			225,000.00
School and agency buildings		480,000.00	330,000.00	
Agency buildings	31,500.00			150,000.00
Relief of distress and prevention of diseases		90,000.00	51,500.00	344,500.00
Emergency relief of destitution			100,000.00	
Sanitary investigations		10,000.00		
Pure vaccine matter and vaccination	5,000.00			
Suppressing liquor traffic		75,000.00	30,000.00	22,000.00
Transporting supplies	225,000.00			
Telegraphing and purchase of supplies	65,000.00			
Warehouse, Omaha	10,000.00			
Warehouse, St. Louis	10,000.00			
Purchase and transportation of supplies		447,784.86	400,000.00	550,000.00
Telegraphing and telephoning		9,000.00	6,800.00	
Traveling expenses, telegraphing and telephoning				16,000.00
Surveying and allotting	72,000.00			
Irrigation	150,000.00	335,700.00		
Suppressing contagious diseases among live stock			15,000.00	30,000.00

TABLE 3.—*General and Local Appropriations, by Classes and Purposes—Continued*

Classes and purposes	Fiscal years			
	1903	1913	1920	1928
GENERAL APPROPRIATIONS— GRATUITY—continued				
Employment of practical farmers.....	\$75,000.00			
Employment of matrons.....	15,000.00			
Industrial work and care of timber.....		\$400,000.00	\$375,000.00	\$315,000.00
Support and civilization.....				900,000.00
Pay of Interpreters.....	5,000.00	1,200.00		
Pay of Indian Police.....	135,000.00	200,000.00	140,000.00	160,000.00
Pay of Judges Indian Police.....	12,540.00	10,000.00	6,500.00	15,000.00
Court costs, suits reallocated lands.....		2,000.00		
Total.....	\$2,574,860.00	\$3,928,394.86	\$4,840,650.00	\$5,630,200.00



FILE COPY



No. 348

In the Supreme Court of the United States

OCTOBER TERM, 1941

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

PETITION FOR REHEARING

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 348

THE SEMINOLE NATION, PETITIONER

v.

THE UNITED STATES

PETITION FOR REHEARING

Comes now the Solicitor General, on behalf of the United States, and respectfully prays for a reconsideration by the Court of its decision of May 11, 1942, reversing the judgment of the Court of Claims herein with respect to the second and fifth items of petitioner's claim.

The opinion of the Court in considering item 5 stated that the payments made by administrative officers of the Government during the fiscal years 1899-1907 to the tribal treasurer of the Seminole Nation were not in violation of section 19 of the Curtis Act of June 28, 1898, 30 Stat. 495, 502. But the Court held that, notwithstanding, the United States would be liable to petitioner if the Seminole government was corrupt at the time of the payments and the federal administrative

officers in charge of Indian affairs then knew that the tribal officials were mulcting the Seminole Nation at large in their disposition of receipts from the United States. Petitioner, in its second amended petition¹ and its brief in the Court of Claims and in its petition for certiorari and briefs in this Court, has consistently based its claim, with respect to the payments concerned in item 5, on violation of section 19 of the Curtis Act. In both the petition for certiorari (Pet. 23), and its main brief on the merits (Br. 25) petitioner stated:

The sole question involved in this item is whether the Secretary of the Interior, or Congress, has plenary power over the affairs of an Indian tribe, and whether the Secretary can disburse Seminole tribal funds in direct contravention of a prohibition by Congress against such disbursement.

The evidence of corruption in the tribal government and of the notice which this received from federal officers, set forth by petitioner in this Court (Pet. 24-30; Br. 26-31), was stated by petitioner (Pet. 24; Br. 26) to be adduced for the purpose of reflecting the intent of Congress in enacting the Curtis Act and so to illuminate its construction.

¹ In petitioner's original petition in the Court of Claims, filed February 24, 1930, it was alleged that it had been the obligation of the United States with respect to item 5 to make payments to the Seminole tribal treasurer and that the Government was liable for failure so to pay.

Petitioner has relied exclusively on section 19 of that statute to establish its claim with respect to item 5. It has made no contention that the United States would be liable to the Seminole Nation on the theory that the Government may have breached a fiduciary obligation to the tribe in making payments to the tribal treasurer at a time when the tribal government was corrupt and the responsible officers of the federal Department of the Interior were aware of its corruption. Instead, petitioner has urged that the payments were otherwise improper—that they were not made in accordance with the applicable treaty and statutory provisions—and therefore did not discharge the obligation of the United States.² Accordingly, during the course of the present litigation the Government has not dealt with such a contention, and the court below has not at any stage given its consideration to the problem.

The Government believes that the contention ought not to prevail in the present case, regardless of the charges that there was corruption in the conduct of the Seminole officials in the years 1899–1907 and of the notice which the responsible federal administrative officers had of the charges, because the argument is foreclosed by the actions

² It is clear from the context that petitioner's quotation (Pr. 36) from the opinion of Chief Judge Cardozo in *Meinhard v. Salmon*, 249 N. Y. 458, 464, was directed to the conduct of the tribal officials rather than to the action of the administrative officers of the United States.

of Congress. Congress had before it when the Curtis Act was considered; as petitioner points out (Br. 26-30), the evidence of tribal corruption which was the basis of the Court's remanding this case to the Court of Claims for further findings and determination with respect to item 5. But, as the Government urged and this Court has held, Congress did not in the Curtis Act prohibit all payments by the United States to the Seminole treasurer but only payments made to tribal officers for disbursement to members of the tribe *per capita*. If Congress had set store upon the charges of corruption, it would seem that it would have prohibited all payments to the treasurer; it chose instead to limit the measure of reform in Indian fiscal affairs and to permit the Seminole government to control the disposition of the funds involved in item 5. It is plain also from the provisions of the Seminole agreement of December 16, 1897,³ ratified by the Act of July 1, 1898, 30 Stat. 567, which contemplated continuance of the Seminole tribal government, that the government was intended to exercise tribal functions, with

³ The agreement was negotiated on the part of the United States by the Dawes Commission, directed earlier by Congress to reach agreements with the Five Civilized Tribes looking toward distribution in severalty of tribal property and termination of the tribal governments. Section 16 of the Act of March 3, 1893, 27 Stat. 612, 645. It was this Commission which in 1894 had made one of the reports of Indian corruption cited by petitioner (Br. 27). H. Ex. Doc. No. 1, 53d Cong., 3d sess., part V, pp. 68-70. But see p. 6, *infra*.

existing machinery, for an unspecified length of time,⁴ necessarily continuing its customary control of tribal finances. The agreement specifically provided (30 Stat. 569) for repeal of the provision in the Act of June 7, 1897; 30 Stat. 62, 84, subjecting action of the Seminole council to presidential veto.

No suggestion is made that the circumstances under which the payments were made in 1899-1907 differed in any material respect from those appearing to Congress in 1898 with respect to earlier years (see Br. 33-36). In any event, Congress was informed during the years concerned by item 5 that the payments by the United States were being made to the tribal treasurer and disposed of by the Seminole government. See H. Doc. No. 5, Indian Affairs, 56th Cong., 1st sess., part I, p. 197; H. Doc. No. 5, Indian Affairs, 57th Cong., 1st sess., part I, p. 231; H. Doc. No. 5, Indian Affairs, 57th Cong., 2d sess., part I, p. 206 (reports of the Secretary of the Interior to Con-

⁴ Section 8 of the Act of March 3, 1903, 32 Stat. 982, 1008, provided that the tribal government of the Seminole Nation should not continue longer than March 4, 1906. However, the Resolution of March 2, 1906, 34 Stat. 822, continued the governments of the Five Civilized Tribes "until all property of such tribes * * * shall be distributed among the individual members". The next month a comprehensive law was passed which indefinitely prolonged the existence of the Indian governments but made their legislation and contracts subject to the approval of the President. Act of April 26, 1906, 34 Stat. 137, 148.

gress for the fiscal years 1899, 1901, and 1902, transmitting the reports of the United States Indian Agent for the Seminoles). With the notice of these reports and of the continued charges of corruption cited by petitioner (Br. 32-35; see R. 64-66), Congress continued to appropriate funds for the payments questioned in item 5. Act of July 1, 1898, 30 Stat. 571, 580; Act of March 1, 1889, 30 Stat. 924, 933; Act of May 31, 1900, 31 Stat. 221, 230; Act of March 3, 1901, 31 Stat. 1058, 1067-1068; Act of May 27, 1902, 32 Stat. 245, 253; Act of March 3, 1903, 32 Stat. 982, 989; Act of April 21, 1904, 33 Stat. 189, 198-199; Act of March 3, 1905, 33 Stat. 1048, 1054; Act of June 21, 1906, 34 Stat. 325, 344.

It is the view of the Government that Congress was aware in 1898 and subsequent years of the charges of official wrongdoing in the Seminole government which were made between 1869 and 1906; Congress also had before it the report of the Dawes Commission, dated September 1, 1899, which stated: "The Seminoles, as has already been seen, are the fewest in numbers of the Five Tribes, and their government has been free from corruption." H. Doc. No. 5, 55th Cong., 1st sess., p. 12. Being apprised of the conflicting evidence, it exercised a legislative judgment by enacting the Curtis Act, by ratifying the Seminole agreement of 1897, and by appropriating funds between 1898 and 1906 to discharge the Govern-

ment's treaty and statutory obligations to pay moneys to the tribal treasurer. In so doing, Congress concluded that the charges of corruption did not warrant a variance in satisfaction of those obligations from the provisions of the treaties and statutes which created the obligations and from the practice which had been followed by the Government theretofore in performance. The judgment exercised by Congress in directing and ratifying the making of the item 5 payments into the Seminole treasury rendered the question of their effectiveness to discharge the obligation of the United States, a political one. Without congressional authorization petitioner would not be entitled to reopen the question in a judicial proceeding and require the payments to be made again on the ground that they were originally made in breach of the Government's fiduciary duty to the Indian people.

The Government believes that the jurisdictional statute under which petitioner instituted the present litigation is not a sufficient basis for such renewed inquiry into the correctness of the payments concerned by item 5 of petitioner's claim. Section 1 of the Act of May 20, 1924, 43 Stat. 133-134, provides:

That jurisdiction be, and is hereby, conferred upon the Court of Claims, notwithstanding the lapse of time or statutes of limitation, to hear, examine, and adjudicate

and render judgment in any and all legal and equitable claims arising under or growing out of any treaty or agreement between the United States and the Seminole Indian Nation or Tribe, or arising under or growing out of any Act of Congress in relation to Indian Affairs, which said Seminole Nation or Tribe may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States.

These provisions are entirely similar to those employed by Congress customarily in jurisdictional acts covering Indian claims; the phrase "legal and equitable claims", or a variant, is present regularly.⁵ The Court of Claims has consistently taken the position that these statutes confer jurisdiction only to ascertain the liability of the United States for violation of the express provisions of treaties or acts of Congress; they do not authorize the consideration of other claims, based on political considerations, which arise out of the relation-

⁵ Act of June 22, 1910, 36 Stat. 580 (Omahas); Act of April 11, 1916, 39 Stat. 47 (Sisseton and Wahpeton Sioux); Act of March 4, 1917, 39 Stat. 1195, 1196 (Medawakanton and Wahpakoota Sioux); Act of February 11, 1920, 41 Stat. 404, 405 (Fort Berthold Indians); Act of April 28, 1920, 41 Stat. 585 (Iowas); Act of May 26, 1920, 41 Stat. 623, 624 (Klamaths, etc.); Act of June 3, 1920, 41 Stat. 738 (Sioux); Act of February 6, 1921, 41 Stat. 1097 (Osages); Act of March 13, 1924, 43 Stat. 21 (Blackfeet); Act of March 19, 1924, 43 Stat. 27 (Cherokees); Act of May 20, 1924, 43 Stat.

ship between the Government and Indian tribes. *Choctaw and Chickasaw Nations v. United States*, 75 C. Cls. 494, 498-499; see *Delaware Tribe of Indians v. United States*, 84 C. Cls. 535, 539. Congressional use in the present case of the familiar jurisdictional formula should not be construed as a repudiation by Congress of its judgment and policy given and formulated at the time of the Curtis Act and Seminole agreement of 1897 and carried out by departmental officers in the next succeeding years with congressional sanction. A proper construction of the Seminole jurisdictional act, the Government believes, would hold that it was effective to lift the bar of sovereign immunity, enabling petitioner to sue the United States in the Court of Claims on causes of action, at law or in

133 (Seminoles); Act of May 24, 1924, 43 Stat. 139 (Creeks); Act of June 4, 1924, 43 Stat. 366 (Wichitas); Act of June 7, 1924, 43 Stat. 537 (Choctaws and Chickasaws); Act of June 7, 1924, 43 Stat. 644 (Stockbridges); Act of January 9, 1925, 43 Stat. 729 (Poncas); Act of February 12, 1925, 43 Stat. 886; Act of March 3, 1925, 43 Stat. 1133 (Kansas Indians) (amended in 1929 to permit gratuity set-offs, 45 Stat. 1258); Act of May 14, 1926, 44 Stat. 555 (Chippewas); Act of July 2, 1926, 44 Stat. 801 (Pottawatomies); Act of March 3, 1927, 44 Stat. 1349 (Shoshones); Act of December 17, 1928, 45 Stat. 1027 (Winnebagos); Act of February 20, 1929, 45 Stat. 1249 (Nez Perces); Act of February 23, 1929, 45 Stat. 1256 (Coos Bays); Act of February 23, 1929, 45 Stat. 1258 (Kansas Indians); Act of December 23, 1930, 46 Stat. 1033 (Warm Springs Indians); Act of March 3, 1931, 46 Stat. 1487 (Pillager Chippewas); Act of April 25, 1932, 47 Stat. 137 (Eastern and Western Cherokees); Act of June 19, 1935, 49 Stat. 388 (Alaska Indians).

equity, which are judicially cognizable; the Court of Claims would not thereby be authorized to inquire into political questions. Cf. *Choctaw and Chickasaw Nations v. United States*, *supra*, at 499.

Because of the broad and far-reaching character of the issue thus involved in the Court's disposition of this case, the Government requests that opportunity be afforded for argument directed to that issue. Such a course would seem particularly desirable in the present case in order to clarify the relation between the Seminole agreement of 1879 and the payments made under it from 1899 to 1907 (one of the classes of payments concerned in item 5). Under Article VIII of the treaty of August 7, 1856, the United States was obligated to make certain *per capita* payments to the Seminoles. Congress in the Act of April 15, 1874, 18 Stat. 29, authorized the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior and the President, to make these annual payments to the Seminole national treasury, provided the consent of the tribe to this procedure should be first obtained. By act of the Seminole General Council, dated April 2, 1879, the tribe accepted the provisions of the statute of 1874, agreeing that annuities under Article VIII of the treaty of 1856 should be paid to the Seminole treasurer and used as the tribal government should direct. As stated in the opinion of the Court (pages 8 and 9),

charges that the Seminole government was corrupt were made between 1869 and 1878 to federal administrative officers responsible for the supervision of Indian affairs. These circumstances were called to congressional attention.⁶ Still, Congress in 1874 authorized the Commissioner to treat with the Indian government for a transformation of the *per capita* payments into payments to that government for its disposal. The Court, while holding that payments made pursuant to the agreement of 1879 may have been in breach of the Government's trust, thus subjecting the United States to liability under the jurisdictional statute, has held (page 12) that the agreement effected a consensual conversion of the Government's obligation from payments to individuals to payments to the tribe. The Government had maintained (Br. 45-57) the effectiveness of this agreement. It seems reasonable to assume that when Congress authorized the making of the agreement it decided that the existing Seminole government was a proper agency for negotiation with the representatives of the United States, discounting the charges of corruption in the tribal government. Since the agreement was validly made and effective, performance under circumstances not materially different from those surrounding its negotiation was sanctioned by Con-

⁶ See Report of the Secretary of the Interior, 41st Cong., 3d sess. (1870-1871), vol. 1, pp. 766-767.

gress and is not now open to question under the jurisdictional act.

Equally, it is the view of the Government that the payments concerned in item 2 of petitioner's claim discharged the corresponding obligation of the United States, by reason of the implied ratification of Congress in enacting the statute of April 15, 1874. These payments were made to the tribal treasurer during the years 1870-1874 pursuant to requests of the Seminole General Council. The obligation of the United States had been to make the payments directly to members of the tribe *per capita*. But the obligation was discharged for the years in question since the Seminole Nation, which had contracted with the United States for the obligation, requested a variance in the mode of discharge. The request was properly honored because the Nation was then a semiautonomous political entity which conducted its affairs through a tribal council possessing authority to enter into treaties and other agreements with the United States. The Government believes that Congress sanctioned this method of discharge when it provided for permanent conversion of the same *per capita* payments into an annuity payable to the Seminole treasury. Act of April 15, 1874, 18 Stat. 29.

The question of the scope of the Court of Claims jurisdiction, under a generic statute such as that underlying petitioner's suit herein, to inquire into

claims of an Indian tribe which arise out of the pursuit by Congress of administrative policy in Indian affairs and after the exercise by Congress of legislative judgment on the question at issue is one of importance. It is therefore respectfully submitted that a rehearing should be granted in this case with respect to the second and fifth items of petitioner's claim.

CHARLES FAHY,
Solicitor General.

I certify that this petition is presented in good faith and not for delay.

CHARLES FAHY,
Solicitor General.

MAY 1942.

p. 16.

No. 348.—OCTOBER TERM, 1941..

The Seminole Nation, Petitioner, } On Writ of Certiorari to
 vs } the Court of Claims.
 The United States. }

[May 11, 1942.]

Mr. Justice MURPHY delivered the opinion of the Court.

This suit to adjudicate certain claims of the Seminole Nation against the United States growing out of various treaties, agreements, and acts of Congress is now before us for the second time. After we reversed, 299 U. S. 417, for want of jurisdiction in the Court of Claims a previous judgment of that court awarding the Seminole Nation \$1,317,087.27,¹ the jurisdictional barrier was removed by statute,² and the Seminole Nation then filed a second amended petition in the Court of Claims, reasserting the six items of claim previously denied by this Court on jurisdictional grounds.³ The Court of Claims thereupon disallowed three items in their entirety, allowed one in full and allowed the remaining two in part, deciding that the Seminole Nation was entitled to \$18,388.30, against which the United States was entitled to gratuity offsets in the amount of \$705,337.33.⁴ Accordingly, the second amended petition was ordered dismissed.⁵ We granted certiorari on a petition chal-

82 C. Cls. 135.

2 The Act of August 16, 1937, c. 651, 50 Stat. 650, conferred jurisdiction on the Court of Claims to reinstate and retry on the merits claims of the Five Civilized Tribes previously dismissed because set up by amended petition after the expiration of the time limit fixed in the respective jurisdictional acts.

³ Seven items, amounting to \$1,307,478.02, were considered by this Court in 299 U. S. 417. As to six of those items it was concluded that no jurisdiction existed in the Court of Claims, and no decision on the merits of those claims was expressed. The seventh item was examined on its merits and disallowed in large part. 299 U. S. 417, 431.

⁴ The Act of August 12, 1935, c. 596, 49 Stat. 571, 596, 25 U. S. C. sec. 475a, provides in part:

"In all suits now pending in the Court of Claims by an Indian tribe or band which have not been tried or submitted, and in any suit hereafter filed in the Court of Claims by any such tribe or band, the Court of Claims is hereby directed to consider and to offset against any amount found due the said tribe or band all sums expended gratuitously by the United States for the benefit of the said tribe or band;"

93 C. Cls. 500.

lenging the correctness of the decision below on each of the five items disallowed in whole or in part, and as to numerous items which the court included in its list of gratuity offsets.

I.

We are of opinion that petitioner, the Seminole Nation, is entitled to no additional allowance on Items One, Three, and Four of its claim.

Item One.

This item is a claim for \$61,563.42, based on Article VIII of the Treaty of August 7, 1856, 11 Stat. 699, 702, whereby the Government promised the Seminole Nation:

"to provide annually for ten years the sum of three thousand dollars for the support of schools; two thousand dollars for agricultural assistance; and two thousand two hundred dollars for the support of smiths and smith shops"

The Court of Claims found that Congress annually made the necessary appropriation of \$7,200 to discharge this obligation during the fiscal years from 1858 to 1867, inclusive; that only \$10,436.58 was actually expended for the purposes specified in the Treaty; and that the balance (\$61,563.42) was diverted and disbursed by the Government prior to June 30, 1866, for the purpose of clothing and feeding refugee and destitute Indians driven from their homes during the Civil War because of their loyalty to the Union.

Petitioner's claim to the diverted balance was properly disallowed because petitioner released its claim by Article VIII of the Treaty of March 21, 1866, 14 Stat. 755, 759, which provides:

"The stipulations of this treaty are to be a full settlement of all claims of said Seminole nation for damages and losses of every kind growing out of the late rebellion, and all expenditures by the United States of annuities in clothing and feeding refugee and destitute Indians since the diversion of annuities for that purpose, consequent upon the late war with the so-called confederate states. And the Seminoles hereby ratify and confirm all such diversions of annuities heretofore made from the funds of the Seminole nation by the United States. And the United States agree that no annuities shall be diverted from the objects for which they were originally devoted by treaty stipulations with the Seminoles, to the use of refugee and destitute Indians, other than the Seminoles or members of the Seminole Nation, after the close of the present fiscal year, June thirtieth, eighteen hundred and sixty-six."

It is unnecessary to consider petitioner's contention that by this Article it did not ratify the diversions in question because they

were made from the funds of the United States and not from funds of the Seminole Nation. The first sentence of Article VIII of Treaty of 1866, quoted above, constitutes a release to the United States of all expenditures of annuities diverted for the purpose of clothing and feeding refugee Indians. There is no requirement that the annuities there referred to must be derived "from the funds of the Seminole nation", and there is no indication that the releases contained in the first sentence of Article VIII are dependent upon the ratification contained in the second sentence. The payments due the Seminole Nation under Article VIII of the Treaty of 1866 clearly come within the scope of the release—being annual payments, they were annuities, and they were diverted for the purpose of clothing and feeding refugee Indians.

Item Three.

This claim for \$61,347.20 grows out of Article III of the Treaty of 1866 in which the Government agreed to establish a \$50,000 trust fund for the Seminole Nation and to pay thereon annual interest of 5% (\$2,500) for the support of schools.

During the period from 1867 to 1874 the Government only partially discharged this annual obligation, disbursing only \$16,902.80 of the \$20,000 appropriated for that purpose. It is here undisputed that, as the Court of Claims held, petitioner is entitled to the deficiency of \$3,097.20.

The Court of Claims correctly disallowed the balance of this item. During the twenty-three years from 1875 to 1898 the annual payments, amounting in all to \$57,500, were paid directly to the tribal treasurer. Since that official disbursed annually not less than \$2,500 in excess of amounts he was otherwise obligated to expend for the maintenance of schools,⁶ there is no need to inquire whether payment to that official was authorized. The schools actually received the benefit of the money. That satisfied the obligation of the Treaty and defeats recovery.

The remainder of this item, \$750, was paid to the United States Indian Agent for the Seminoles in 1907. Such payment was proper under Section 11 of the Act of April 26, 1906, c. 1876, § 34

⁶ Petitioner does not question this finding of the Court of Claims. See Annual Reports of the Commissioner of Indian Affairs: 1876, pp. 212-213; 1877, pp. 690-691; 1878, pp. 286-287; 1879, pp. 341-342; 1881, pp. 286-287; 1883, pp. 90, 250-251; 1884, pp. 270-271; 1886, pp. 146, 154; 1887, pp. 98, 110; 1888, pp. 113, 122; 1890, pp. 89, 94; 1891, pp. 240, 250; 1892, pp. 247, 256; 1893, pp. 143, 147; 1894, p. 140; 1895, pp. 155, 161; 1896, pp. 151-158.

Stat. 137, 141;⁷ and nothing in the applicable jurisdictional act⁸ indicates any intention on the part of Congress to override or repeal the Act of 1906.

Item Four.

The Government agreed in Article VI of the Treaty of 1866 to construct, "at an expense not exceeding ten thousand (\$10,000) dollars, suitable agency buildings" on the Seminole reservation. In 1870 and 1872 \$931.76 was expended for agency buildings and repairs. Petitioner's claim for the difference of \$9,068.24 between this sum and \$10,000 is without merit. In 1872 Congress appropriated \$10,000 to fulfill this treaty obligation;⁹ \$9,030.15 of this appropriation was expended for some undisclosed purpose, as only \$969.85 was returned to surplus. The Court of Claims found that an agency building was erected on the Seminole reservation in 1873.¹⁰ Petitioner makes no claim that the building erected was unsuitable. Since the Government's promise was not to expend \$10,000, but to erect suitable buildings at a cost not in excess of \$10,000, it follows that there was no violation of the treaty provision; and hence no right of recovery.

II.

With respect to Items Two and Five we are of opinion that the cause must be remanded to the Court of Claims for further material findings of fact.

Item Two.

This is a claim for \$154,551.28 based on one of the provisions of Article VIII of the Treaty of 1856, namely, the Government's promise to establish a \$500,000 trust fund (originally two funds of \$250,000 each), the annual interest therefrom (\$25,000) to be paid over to the members of the Seminole Nation per capita as an

⁷ "That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes."

⁸ Act of May 20, 1924, c. 162, 43 Stat. 133, as amended by 44 Stat. 568, 45 Stat. 1229, and 50 Stat. 650.

⁹ Act of May 18, 1872, c. 172, 17 Stat. 122, 132.

¹⁰ See Report of the Commissioner of Indian Affairs for 1873, pp. 211-212.

annuity. The findings of the Court of Claims show that although Congress appropriated \$25,000 annually for each of the fiscal years in controversy (1867-1898, 1907-1909), the Government did in fact fail to make direct per capita disbursements of a portion of the funds appropriated in 1867-1874, 1876, and 1879, the underpayments for those years totalling \$92,051.28, and that one-half the appropriation in 1907 and the entire appropriation in 1908 and 1909 (\$62,500 in all), instead of being paid directly to the individual Seminoles, was paid to the United States Indian Agent for the Seminole Nation.

The Court of Claims reduced petitioner's claim for \$154,551.28, based on these underpayments and alleged mispayments to \$13,501.10, allowing the Government three setoffs, consisting of (a) overpayments of \$12,127.54 made in 1875, 1877, 1880, 1882, and 1883; (b) payment of \$62,500 made to the United States Indian Agent for the Seminoles in 1907, 1908, and 1909; and (c) payments of \$66,422.64 made pursuant to requests of the Seminole General Council during the period from 1870 to 1874.

The overpayments were rightly deducted, cf. *Wisconsin Central R'd. v. United States*, 164 U. S. 190, and petitioner does not contend otherwise. Nor is petitioner entitled to any part of the \$62,500 paid directly to the Indian Agent, for such payments were proper under the Act of 1906, 34 Stat. 137, 141, which, as pointed out in the discussion of Item Three, *ante*, was not repealed by the jurisdictional act, 43 Stat. 133. There is thus left for consideration only the payments from 1870 to 1874 made pursuant to requests of the Seminole General Council and totalling \$66,422.64; of this amount \$37,500 was paid directly to the tribal treasurer, and the remaining \$28,922.64 to designated creditors.

The Government contends that since those payments were made at the request of the tribal council, the governing body of a semi-autonomous political entity, possessing the power to enter into treaties and agreements with the United States, the tribe is not now entitled to receive payment a second time, and that, despite the fact that the Treaty of 1856 provided that the payments were to be made per capita for the benefit of each individual Indian, these payments at the request of the General Council discharged the treaty obligation because the agreement was one between the United States and the Seminole Nation and not one between the United States and the individual members of the tribe.

The argument for the Government, however sound it might otherwise be, fails to recognize the impact of certain equitable considerations and the effect of the fiduciary duty of the Government to its Indian wards. The jurisdictional act, 43 Stat. 133, expressly confers jurisdiction on the Court of Claims to adjudicate "all legal and equitable claims"; arising under treaty or statute, which the Seminole Nation may have against the United States, and the second amended petition avers:

"That since the passage of the Act of April 15, 1874, it was reported by the officers of the defendant [the United States] that the Seminole tribal officials were misappropriating the Seminole tribal funds entrusted to them, and robbing the members of the tribe of an equal share of the tribal income. That the reports of the Dawes Commission show conclusively that the governments of the Five Civilized Tribes were notoriously and incurably corrupt, that every branch of the service was infested with favoritism, graft and crookedness, and that by such methods the tribal officers acquired large fortunes, while the other members entitled to share in the tribal income received little benefit therefrom."

It is a well-established principle of equity that a third party who pays money to a fiduciary for the benefit of the beneficiary, with knowledge that the fiduciary intends to misappropriate the money or otherwise be false to his trust, is a participant in the breach of trust and liable therefor to the beneficiary. Cf. *Duncan v. Jaudon*, 15 Wall. 165; *Manhattan Bank v. Walker*, 130 U. S. 267. See Bogert, *Trust and Trustees* (1935), vol. 4, secs. 901, 955; Scott, *Trusts* (1939), vol. 3, sec. 321.1; American Law Institute, *Restatement of the Law of Trusts* (1935), sec. 321. The Seminole General Council, requesting the annuities originally intended for the benefit of the individual members of the tribe, stood in a fiduciary capacity to them. Consequently, the payments at the request of the Council did not discharge the treaty obligation if the Government, for this purpose the officials administering Indian affairs and disbursing Indian moneys, actually knew that the Council was defrauding the members of the Seminole Nation.

Furthermore, this Court has recognized the distinctive obligation of trust incumbent upon the Government in its dealings with these dependent and sometimes exploited people. E. g. *The Cherokee Nation v. The State of Georgia*, 5 Pet. 1; *United States v. Kagama*, 118 U. S. 375; *Choctaw Nation v. United States*, 119 U. S.

1; *United States v. Pelican*, 232 U. S. 442; *United States v. Creely Nation*, 295 U. S. 103; *Tulee v. State of Washington*, — U. S. —, No. 318 this Term. In carrying out its treaty obligations with the Indian tribes the Government is something more than a mere contracting party. Under a humane and self imposed policy which has found expression in many acts of Congress¹¹ and numerous decisions of this Court, it has charged itself with moral obligations of the highest responsibility and trust. Its conduct, as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards. Payment of funds at the request of a tribal council which, to the knowledge of the Government officers charged with the administration of Indian affairs and the disbursement of funds to satisfy treaty obligations, was composed of representatives faithless to their own people and without integrity would be a clear breach of the Government's fiduciary obligation.¹² If those were the circumstances, either historically notorious so as to be judicially noticed or otherwise open to proof, when the \$66,422.64 was paid over at the request of the Seminole General Council during the period from 1870 to 1874, the Seminole Nation is entitled to recover that sum, minus such amounts as were actually expended for the benefit of the Nation by the Council.

Having formulated the proper rule of law, we must examine the facts of this case. Although the Court of Claims had jurisdiction of this issue, for such an action for breach of fiduciary duty growing out of treaty obligations is clearly an equitable claim within the meaning of the jurisdictional act, 43 Stat. 133,

¹¹ There is no better example of this than the facts of the instant case. Despite the lapse of time and the bar of the statute of limitations, Congress authorized the Court of Claims to adjudicate all legal and equitable claims, arising under statute or treaty, which the Seminole Nation may have against the United States. And after an adverse decision by this Court on jurisdictional grounds, 299 U. S. 417, Congress again removed the bar. 50 Stat. 650.

¹² As was well said by Chief Judge (later Mr. Justice) Cardozo in *Meinhard v. Salmon*, 249 N. Y. 458, 464, 164 N. E. 545, 546:

"Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd."

the court did not consider, and hence made no findings on this issue. We think the issue material. During the period in question, 1870-1874, the administration of Indian affairs and the disbursement of Indian moneys were lodged with the Department of the Interior. The Commissioner of Indian Affairs, under the general supervision of the Secretary of the Interior, actively supervised these matters.¹³ There are ample indications in the record before us that the Seminole General Council was misfeigning the Nation and that the proper Government officials may well have had knowledge thereof at the time some, at least, of the payments were made. For about this time the Commissioner of Indian Affairs received several warnings from his subordinates that "injustice to the majority" of the Seminoles existed,¹⁴ that the chiefs were in the habit "of taking out what amount they chose" from the annuities,¹⁵ that the Seminoles were "in bad hands",¹⁶ and that the

¹³ See R. S. secs. 441, 444, 445, 463, 464, 2089. Cf. Act of April 15, 1874, c. 97, 18 Stat. 29.

¹⁴ On December 6, 1869, the United States Indian Agent for the Seminoles wrote to the Commissioner of Indian Affairs as follows:

"I would state that they are in the habit of calling Councils, for any little thing that may arise, and spending from 2 to 15 days without effecting anything whatever, which would be of the least service to the nation [Seminole], except in expending the funds; which are taken out of those ordered paid per 'capita' to the nation."

"I find that it has been the custom heretofore for the Chiefs to order how the payment should be made, but at the same time making return to the department, upon rolls as if it had been paid per 'capita'."

"I think that it is an injustice to the majority of the people, comprising this nation and the only way to avoid the unnecessary expenditure of money for Councils, etc. which are of but little benefit to the nation (for example the last council held cost the nation \$700.00 for edibles alone and did no business) is for the department to give special orders in reference as to what amount shall be turned over to the chiefs and the balance paid to heads of families in person."

¹⁵ In his annual report to the Commissioner of Indian Affairs, dated September 1, 1870, the United States Indian Agent for the Seminoles said:

"Per capita payments are, in some instances, I think, a great evil; but as the system cannot be abolished, this nation [Seminole] having no constitutional government, and until such a form of government be adopted, I would recommend that the provisions of the treaty be rigidly enforced, and no moneys allowed to be paid except to the heads of families. Heretofore, as I have reported, the chiefs have been in the habit of taking out what amount they chose, allowing the balance to be paid per capita. This is an injustice, as few receive the bulk of their annuities." Report of the Secretary of the Interior, 41st Cong., 3d Sess. (1870-71), vol. 1, pp. 766-767.

¹⁶ The report of John P. C. Shanks, Special Commissioner, to the Commissioner of Indian Affairs, dated August 9, 1875, states:

"These claims are enormous in amount, and show too clearly that the Seminoles are in bad hands. These parties who had these claims (except Harjo,

chiefs intended "to 'gobble' the next money for the purpose of keeping up their government".¹⁷ And the Acting Commissioner of Indian Affairs was evidently aware in 1872 of the possibility that the Council was faithless for he declined to change the method of payment at the request of the Seminole Chiefs "until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs".¹⁸

We do not say that all this establishes liability on the part of the Government for it is not our function, in reviewing judgments of the Court of Claims, to make basic findings of fact. When the Court of Claims fails to make findings on a material issue, it is proper to remand the case for such findings. Cf. *Universal Battery Co. v. United States*, 281 U. S. 580, 584-585. We do think, however, that the matter outlined above was sufficient to require the Court of Claims to make findings on this material issue, that is, findings as to whether the Seminole General Council, during the years 1870 to 1874, was corrupt, venal, and false to its trust; whether the appropriate Government officials charged with the duty of administering Indian affairs and disbursing funds to the Seminoles knew of that corruption, venality, and faithlessness, if such in fact existed, when any of the payments in question were made at the request of the Council; and, if so, whether the Nation received the benefit of any of those payments. Accordingly, this

who is an assignee) are or have been officials in the Nation. Robert Johnson is a negro, and is interpreter to the Chief; Chupco is present chief; John Jumper was former chief; James Factor, a half breed, is treasurer; E. J. Brown is a white man, formerly U. S. Indian Agent of the Seminole Nation, since has had the address to procure his admission as a member of the tribe.

"These men have evidently stood together in the wrong, of procuring such allowances, and did stand together in refusing to relinquish the claims, or a part of them, except a deduction for present payment upon claims which did not bear interest."

¹⁷ On November 20, 1878, special agent Meacham wrote the Commissioner of Indian Affairs that "Some of the Band Chiefs are tyrants and despots, holding their people under abject fear and in some instances of actual servitude." The letter also referred to the intention of the Chiefs "to 'gobble' the next money for the purpose of keeping up their government."

¹⁸ On January 5, 1872, the Acting Commissioner of Indian Affairs wrote the United States Indian Agent for the Seminoles:

"In reply to your letter of the 20 Dec. last, and to the request of the Seminole Chiefs that their National funds be hereafter paid to the Treasurer of the Nation instead of per capita, I have to say that it is not deemed advisable to change the manner in which payment of annuities to these Indians has heretofore been made until the Department shall be fully satisfied that a proper disposition will be made of the funds if paid in the manner proposed by the Chiefs."

phase of the case must be remanded so that the Court of Claims can consider such relevant evidence and other data as may be brought to its attention, make the necessary findings of fact, and thus determine whether this case fits into the rule which we have enunciated.

Item Five.

This is a claim for the moneys, \$864,702.58 in all, paid to the Seminole tribal treasurer after the passage of the Curtis Act of June 28, 1898, c. 517, 30 Stat. 495, 502. The payments were made during the fiscal years 1899 to 1907 and consisted of the following items: (a) \$212,500 paid to discharge the per capita obligation under Article VIII of the Treaty of 1856 (see Item Two *ante*); (b) \$29,750 paid to discharge the obligation of Article III of the Treaty of 1866 providing for the support of schools (see Item Three, *ante*) and for the support of the Seminole Government; (c) \$622,156.87 paid pursuant to Section 12 of the Act of March 2, 1889, c. 412, 25 Stat. 980, 1004, providing for the payment of interest at five per centum per annum on \$1,500,000 "to be paid semi-annually to the treasurer of said nation"; and, (d) \$295.71, the "proceeds of labor".

Section 19 of the Curtis Act, 30 Stat. 495, 502, provides:

"That no payment of any moneys on any account whatever shall hereafter be made by the United States to any of the tribal governments or to any officer thereof for disbursement, but payments of all sums to members of said tribes shall be made under direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation."

Petitioner insists that this section prohibited the Government from making the payments in question to the Seminole treasurer, and that it is entitled to recover the sums illegally so paid.

Assuming, without deciding, that Section 19 is applicable to the Seminole Nation and that an action could be brought by the Nation for payments made in violation thereof, there can be no recovery here because none of the payments contravened Section 19. The text of that section and its legislative history demonstrate that it prohibits only payments to tribal officers which are "for disbursement"—i. e., payments to be distributed by them to members of the tribe. If the first clause of Section 19 is construed as

prohibiting all payments to the tribe or its officers, then the later clauses, providing only for payments to members and per capita payments, are inadequate to dispose of the problems raised by the first clause. For then no provision is made for the expenses of maintaining and conducting the tribal government, despite the fact that the Seminole tribal government was not only to continue after the Curtis Act but was in fact relieved of the necessity of securing Presidential approval of its legislation¹⁹ by an agreement, ratified three days after the passage of that statute. See 30 Stat. 567, 569. Section 19, as originally introduced in the House, provided that payments of "all expenses incurred in transacting their business" were to be made under the direction of the Secretary of the Interior.²⁰ The deletion of this clause is persuasive that Congress intended that tribal officers should retain the right to disburse their funds for the expenses of their respective tribal governments. For these reasons we think Section 19 prohibits payment by the Government to the tribal treasurer only when such payments are to be distributed by him to members of the tribe. It has no application to money earmarked for educational or tribal purposes, and money intended for any purpose the tribe may designate.

None of the payments in question were for disbursement to the individual members of the Seminole Nation. While the sum of \$212,500 was paid pursuant to Article VIII of the Treaty of 1856, and while that obligation was originally an annuity payable per capita to the individual Seminoles, the character and purpose of this interest payment were by agreement changed into a payment for the benefit of the Seminole Nation itself, and this before the payment of the \$212,500 from 1899 to 1907. The Act of April 15, 1874, c. 97, 18 Stat. 29, authorized the Commissioner of Indian Affairs, with the sanction of the Secretary of the Interior and the President, to pay this annuity into the treasury of the Seminole

¹⁹ Act of June 7, 1897, c. 3, 30 Stat. 62, 84.

²⁰ Section 19, as originally introduced, was as follows:

" . . . that no payments of any moneys, on any account whatever, be made to any of the tribal governments or to any officer thereof for disbursement, but payments of all expenses incurred in transacting their business and of all sums to members of said tribes shall be made under the direction of the Secretary of the Interior by an officer appointed by him; and per capita payments shall be made direct to each individual in lawful money of the United States, and the same shall not be liable to the payment of any previously contracted obligation." [Italics supplied.] H. R. 8581, 55th Cong., 31 Cong. Rec. 3869.

Nation, provided \$5,000 was annually appropriated out of the annuity by the General Council for the school fund, and provided "that the consent of said tribe to such expenditures and payment shall be first obtained". By act of the Seminole General Council on April 2, 1879, the Seminole Nation accepted the provisions of the Act of 1874, and consented that all annuities due or to become due under Article VIII of the Treaty of 1856 should be paid into the Seminole treasury, to be used as the tribal council should provide. This was a consensual conversion of the Government's obligation from payments to individuals to payments to the tribe, and Section 19 of the Curtis Act is inapplicable to the \$212,500 paid pursuant to this converted agreement.

While none of the payments were in violation of Section 19 of the Curtis Act and there can therefore be no recovery on that score, the Government is not necessarily relieved of all liability for this \$864,702.58 claim. There remains for consideration the fiduciary duty of the Government, as discussed in Item Two, *ante*. During this period, 1899 to 1907, as from 1870 to 1874, the Secretary of the Interior and the Commissioner of Indian Affairs supervised Indian matters and the disbursement of Indian moneys. Apparently, it was the practice of the Department of the Interior to deposit the Seminole funds with the Assistant Treasurer of the United States at St. Louis to the credit of the tribal treasurer; the Indian agent for the Five Civilized Tribes did not disburse the Seminole payments although he did distribute moneys to the other tribes.²¹ Shortly before the payments in question were made the Commission to the Five Civilized Tribes²² pointedly described in its annual reports to the Secretary of the Interior and Congress the unbridled corruption of the various tribal governments, without singling out any particular government for unenviable distinction. Thus:

"Corruption of the grossest kind, openly and unblushingly practiced, has found its way into every branch of the service of the tribal governments. All branches of the governments are reeking with it, and so common has it become that no attempt at

²¹ Letter of Assistant Attorney General Van Devanter to the Secretary of the Interior, dated July 12, 1898; H. Doc. vol. 23, 57th Cong., 1st Sess. (1901-1902), p. 231.

²² Commonly known as the Dawes Commission. It was created by the Act of March 3, 1893, c. 209, 27 Stat. 612, 645, to negotiate with the Creeks, Cherokees, Choctaws, Chickasaws, and Seminoles for the extinguishment of tribal titles to land, the allotment of their lands in severalty, and the division of their funds equally among the members of those tribes.

concealment is thought necessary. The governments have fallen into the hands of a few able and energetic Indian citizens, nearly all mixed blood and adopted whites, who have so administered their affairs and have enacted such laws that they are enabled to appropriate to their own exclusive use almost the entire property of the Territory of any kind that can be rendered profitable and available."²³

And again:

"The Commission is compelled by the evidence forced upon them during their examination into the administration of the so-called governments in this Territory to report that these governments in all their branches are wholly corrupt, irresponsible, and unworthy to be longer trusted with the care and control of the money and other property of Indian citizens, much less their lives, which they scarcely pretend to protect."²⁴

While these warnings were of a general nature, specific complaints of misgovernment, venality, and fraudulent conduct on the part of the Seminole leaders were brought to the attention of the Secretary of the Interior and the Commissioner of Indian Affairs. By a letter to the Secretary of the Interior, dated January 24, 1898, certain Seminoles remonstrated against the ratification of the agreement concluded with the Seminole leaders on December 16, 1897. The remonstrance alleged misgovernment and the participation by these leaders in a land swindle at the expense of the tribe. The Secretary laid this protest before Congress.²⁵ During

²³ Report dated November 20, 1894, Appendix B, H. Ex. Doc., vol. 14, 53d Cong., 3d Sess. (1894-95), p. LXVIII. See also pp. LXIX-LXX.

²⁴ Report dated November 18, 1895, Exhibit A, H. Doc., vol. 14, 54th Cong., 1st Sess. (1895-96), p. XCV. See also pp. LXXXVII, XCIII-XCIV.

And see report dated October 11, 1897, Exhibit B, H. Doc., vol. 12, 55th Cong., 2d Sess. (1897-98), pp. CXIX, CXXI.

²⁵ See S. Doc. 105, 55th Cong., 2d Sess. (1898), pp. 2-4. This remonstrance stated in part:

"There was the sum of \$191,294.20 which never entered the treasuries of the United States or the Seminoles. The reply given us about the disposition of this money by our authorities was that during the transfer of these lands to the United States there was a lawyer who negotiated the agreement and took that amount for his pay. The name of the lawyer was never mentioned and no receipt of the alleged deal was ever shown. We call your attention to this. We ask that you take note of the town-site laws of Wewoka and see to whom only these laws are beneficial and whom they oppress.

"We beg leave to state further that we have no law regulating the bond of our treasurer or chief, and according to the Seminole law no action or bill can be placed before the council without the consent of the chief. Our laws do not admit of an auditor, and our people are entirely ignorant of the condition of our finances. . . . We ask that any disposition of moneys belonging to the Seminoles and the management of their schools be made with the approval of the Secretary of the Interior. . . ."

much of the period in question, 1899-1907, and for some time prior thereto, two half-breed brothers were principal chief and treasurer, respectively, of the Seminole Nation. Together they ran a trading store in the Seminole country and extended credit by giving due bills, good only in trade at their store, to individual Seminoles in the amount of annuities or other payments owing those individuals. The activities of these brothers, and their system of credit in particular, were attacked on the floor of Congress in 1896 and 1897,²⁶ and severely criticized by an investigator for the Department of Justice in 1905, part of whose report was set forth in a letter from the Acting Commissioner of Indian Affairs to the Secretary of the Interior, dated November 11, 1905.²⁷

All this tends to show that the Seminole tribal officers might have been faithless to their trust during the period in question, and that the Government officials administering Indian affairs and disbursing Seminole funds might have been aware of that faithlessness at the time payments were made to the Seminole treasurer. Here again the Court of Claims did not address itself to, and made no findings on this material issue. As we said in the discussion

²⁶ See 28 Cong. Rec. 2070; 29 Cong. Rec. 1261.

²⁷ This report stated in part:

"It is not too much to say that, in view of the ignorance of these Indians, this system of credit is dishonest. It should be condemned because it keeps these Indians in a constant state of poverty. They do not realize that these due bills are in fact money, and the result is that they are squandered without care. I am not informed as to whether the Department of the Interior has knowledge of this state of affairs. It should be brought to its attention, so that, if possible, it may take steps looking to the breaking up of the system, which can be done by having the appropriations distributed in some other manner."

Wm. L. Bowie, Special Investigator for the Interior Department, reported to the Superintendent for the Five Civilized Tribes in 1916 that:

"Governor Brown and his brother have been in the mercantile business in the Seminole Nation for many years. It is a fact much commented upon by those acquainted with Seminole tribal affairs, that for a number of years Governor Brown held the dual relationship to the members of the Seminole tribe of governor and paymaster on the one hand, and Indian trader on the other hand."

"In my opinion Governor Brown has shown in his transactions with John Smith and Lizzie Yohola, that he has little regard for the welfare and protection of Indians in general, and it is unfortunate that he occupies a position which enables him by reason of the confidence placed in him as such official to impose upon them."

On the basis of reports from subordinates Assistant Commissioner of Indian Affairs Merritt recommended to the Commissioner of Indian Affairs, by a letter dated July 20, 1916, that the Seminole tribal government be abolished as "the only way to prevent Brown and Crain from continuing to use their official positions to advance their personal interests at the expense of the Indians under their authority".

of Item Two, *ante*, it is not our function to make basic findings of fact. Again we do not say that the showing with respect to this Item establishes breach of the Government's fiduciary obligation, but we are of opinion that it is sufficient to justify remanding this branch of the case to the Court of Claims for further findings, in the light of such evidence as may be brought to its attention, as to whether the Seminole tribal officers were muleting the Nation from 1899 to 1907; whether, if such were the case, the appropriate Government officials administering Indian affairs and disbursing moneys to the Seminoles had knowledge thereof at the time any of the payments to the tribal treasurer were made; and, if so, whether the Seminole Nation received the benefit of any sums expended by the tribal treasurer. On the basis of these findings the Court of Claims can then determine whether there was a breach of the Government's fiduciary obligation, as defined in the discussion of Item Two, *ante*, and if there was a breach, the resultant liability.

III.

Petitioner asserts that the Court of Claims committed numerous errors with respect to the items which it included in the list of gratuitous offsets, and the Government admits that the court erred in a few instances. However, since the case must be remanded to determine whether the Government has any further obligation on Items Two and Five, we deem it unnecessary to consider in detail the challenged offsets.

One phase of this question does require attention. In *Seminole Nation v. United States*, No. 830 this Term, decided today, petitioner asserted that the Court of Claims gave the Government credit there for an offset which it had employed in the instant case, thus allowing a double credit. To avoid this confusion the Court of Claims should find and designate the precise gratuitous expenditures to be offset against the Government's liability, instead of finding generally all the items which the Government may ever be entitled to use. Gratuity offsets resemble a fund in a bank, to be drawn upon by the Government in successive Indian claims cases until exhausted. Since they may be needed in future cases, it becomes important to know precisely what items have been employed to extinguish liability in a particular case, as the instant case and No. 830 demonstrate. The disadvantage of the alternative, to treat as binding in subsequent suits involving the same

parties the findings of the Court of Claims that the Government has total offsets in a certain amount, is evident because it may require this Court to do a vain thing, that is, to examine offsets which might never be needed and which, even if disapproved, would not change the result reached by the Court of Claims.

The judgment below is reversed, with the exception of the disposition of Items One, Three and Four which is in all respects affirmed, and the entire cause is remanded to the Court of Claims with directions to make further findings with respect to Items Two and Five; to determine the additional liability of the Government, if any, thereon; and, to find and designate the particular gratuitous expenditures to be offset against the Government's total liability.

So ordered.

Mr. Justice REED took no part in the consideration or decision of this case.

Mr. Justice JACKSON dissents.

A true copy.

Test:

Clerk, Supreme Court, U. S.

Upon the remand the Court of Claims will be free to consider any legal or equitable defenses which the Government may interpose to the claims asserted there by petitioner.

